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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 10

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT WITH GERTRUDE FELDMAN JAMES, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1935

CERTIORARI GRANTED APRIL 29, 1935

SUPREME COURT OF THE UNITED STATES

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1 Before the United States Board of Tax Appeals

Docket No. 72522

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN Agreement with Gertrude Feldman James, deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Entries.

Appearances:
For Petitioner: Edw. M. Cameron, Jr., Esq.
For Respondent: L. S. Pendleton, Esq.

1933
June 6—Petition received and filed. Taxpayer notified. (Fee paid.)
June 6—Copy of petition served on General Counsel.
July 19—Answer filed by General Counsel.
July 24—Copy of answer served on taxpayer.
Aug. 28—Hearing set October 19, 1933.
Oct. 17—Stipulation of facts with affidavit attached filed.
Oct. 19—Hearing had before Mr. Smith, Division 5, on the merits. Submitted. Stipulation of facts filed heretofore. Briefs due in 30 days.
2 Oct. 24—Transcript of hearing of October 19, 1933 filed.
Nov. 20—Brief filed by taxpayer.
Nov. 21—Order that parties be granted an extension to November 21, 1933 to file briefs entered.

1934
Feb. 21—Opinion rendered—Mr. Smith [illegible]vision 5. Judgment will be entered for petitione
Feb. 27—Decision entered—Division 5, M.. Smith.
May 7—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.
May 15—Proof of service filed by General Counsel.
June 27—Praecipe with proof of service thereon filed by General Counsel.
July 6—Order enlarging time to 8/15/34 for transmission and delivery of record entered.

Before United States Board of Tax Appeals

[Title omitted.]

3 *Petition*

The above-named petitioner, City Bank Farmers Trust Company, as trustee under a trust agreement with Gertrude Feldman James, deceased, dated February 21, 1930, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing date April 7, 1933,

and bearing the symbols MT-ET-C1-NR-26147-SEM, and as a basis for its proceedings alleges upon information and belief as follows:

1. Your petitioner, City Bank Farmers Trust Company, a corporation duly organized and existing under the laws of the State of New York, has its principal place of business at No. 22 William Street, in the Borough of Manhattan, city, county, and State of New York.

4 The said Gertrude Feldman James died on or about the 20th of May 1931. At the time of her death she was a nonresident alien of the United States, being a resident and subject of the Kingdom of Great Britain. On February 21, 1930, she created a trust with City Bank Farmers Trust Company, as trustee, a copy of which agreement creating said trust is hereto annexed and marked "Exhibit A."

2. The notice of deficiency, a copy of which is hereto annexed and marked "Exhibit B", was mailed to said City Bank Farmers Trust Company on April 7, 1933.

3. The tax in controversy is the Federal estate tax upon the estate of said decedent and is in the amount of $11,840.03.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors, to wit:

The Commissioner of Internal Revenue has erroneously determined that certain securities held by the petitioner as principal of the said trust and over which the decedent had no control or power of disposition at the time of her death, should be included as part of the gross estate of this decedent.

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) In due course and seasonable time, the petitioner as
5 trustee as aforesaid, duly filed with the said Commissioner of Internal Revenue through the collector of internal revenue for the second district of New York, a return of the property held by said trustee as provided for by the Revenue Act of 1926, upon the form provided for such purpose by the United States Commissioner of Internal Revenue and the United States Treasury Department.

Thereafter, the said return filed as aforesaid was audited by the Commissioner through his proper representative, and the said petitioner notified of the result of such audit and report by letter bearing date October 22, 1932, signed by J. R. Baradel, internal revenue agent in charge. Upon a protest being filed by the said trustee to the said report, the Commissioner of Internal Revenue considered said protest and considered the said letter of J. R. Baradel as aforesaid, and reaudited the said return filed as aforesaid and determined a tentative deficiency tax as aforesaid in the sum of $11,840.03, and advised petitioner thereof by letter bearing date April 7, 1933, signed by R. M. Estes, deputy commissioner, being the letter herein-

before in paragraph numbered 2 hereof mentioned, a copy whereof is hereto annexed and marked "Exhibit B" as aforesaid.

(b) As hereinabove stated, the said Gertrude Feldman James died on or about the 20th day of May, 1931. On February 21, 1930, she created a trust with City Bank Farmers Trust Company as trustee.

(c) By paragraph 12 of the agreement creating said trust,
6 the decedent has a conditional right to modify, alter, or revoke the same, this right, however, being expressly conditioned upon the consent in writing of the trustee and of Samuel James, decedent's husband, during his life, and after his death, upon the consent in writing of the trustee and the settlor's brother-in-law.

(d) The said Samuel James, whose written consent it was necessary to obtain in order to effect a revocation of the trust, was entitled under the terms of the said trust agreement to the income of the trust after the death of the said Gertrude Feldman James, and was therefore a person having an interest in the said trust adverse to that of the said Gertrude Feldman James, the settlor thereof.

(e) Section 302 (d) of the Revenue Act of 1926 has no application to trusts where the power to revoke or alter is dependent upon the consent of one having an adverse interest in the trust.

(e) Said section 302 (d) of the Revenue Act of 1926, insofar as it is intended to apply to a trust where the power to revoke or alter, is dependent on the consent of one having an adverse interest therein, is unconstitutional in the following and other respects:

(1) In that it is an arbitrary and capricious taking of propery without due process of law, in violation of the fifth amendment of the Constitution of the United States.

(2) In that it is the taking of private property for public
7 use without just compensation, in violation of the said fifth amendment.

(3) In that Congress has no power to impose a Federal estate tax based upon property not owned by decedent and over which the decedent had no control at the time of his death.

Wherefore, petitioner prays that this Board may hear the proceeding and render judgment in accordance with the foregoing.

EDWARD M. CAMERON, Jr.
CHARLES W. RIVOIRE,
Counsel for Petitioner,
Office and P. O. Address, 20 Exchange Place, New York, N. Y.

TAYLOR, BLANC, CAPRON & MARSH,
Of Counsel,
20 Exchange Place, New York, N. Y.

[*Duly sworn to by P. A. Miller, jurat omitted in printing.*]

8 *Exhibit A, to foregoing petition*

This agreement, made, executed and delivered in the city of New York, the 21st day of February, 1930, by and between Gertrude

Feldman James (hereafter called "the Settlor") and the City Bank Farmers Trust Company (hereafter called "the Trustee"). Witnesseth,

The Settlor hereby assigns, transfers, conveys and sets over unto the City Bank Farmers Trust Company as trustee, the property described in schedule A hereof, to be held by said Trustee in trust for the uses and purposes herein set forth.

1. To hold, invest, reinvest and keep the said trust property
9 invested during the lives of Vera Nanette James, daughter of the Settlor and of Samuel James, husband of the Settlor, and Peggy Florence James, daughter of the Settlor and of the said Samuel James, that is, until the death of the survivor of the said Vera Nanette James and Peggy Florence James, said period being hereinafter designated as the "trust period"; to collect the rents, issues, and profits thereof and to apply in the income from said trust property to and for the use of the Settlor until her death or until the termination of the trust period, whichever event shall first occur, and upon and after the death of the Settlor prior to the termination of the trust period, to hold the said trust property and apply the income thereof as follows:

A. To apply the income thereof to the use of the said Samuel James, husband of the Settlor, if then living, until his death or until the termination of the trust period, whichever event shall first occur, or, if not then living, or upon his death prior to the termination of the trust period, to divide the principal into so many equal shares that there shall be one for each child of the Settlor and of the said Samuel James then living and one for the descendants then living of a deceased child of the Settlor and of the said Samuel James and to dispose of the income and principal of said shares as follows:

(a) To apply the income of each share held for a child of the Settlor and of the said Samuel James to the use of such child
10 until his or her death or until the termination of the trust period, whichever event shall first occur, and upon his or her death prior to the termination of the Trust period, to pay over the principal of such share to such child's descendants and in such proportions as such child may have appointed by will and to pay over any part not effectively so appointed in equal parts per stirpes to his or her descendants then living or if none, in equal parts per stirpes to the surviving children of the Settlor and of the said Samuel James and the descendants then living of a deceased child of the Settlor and of the said Samuel James or, if none be then living, to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

(b) To pay over the principal of a share set apart for the descendants of a deceased child, in equal parts per stirpes, to such descendants.

B. Upon the termination of the trust period, to pay over the principal of the trust fund to the said Samuel James, if then living, or if not, to the Settlor, if then living, or if not, to such beneficiaries as shall then be receiving income according to the provisions of paragraph 1. A. (a) hereof, and in the same proportions as provided therein for the distribution of income, or if no such beneficiar be then living, then to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

11 2. Income shall be applied in as nearly equal quarterly instalments as is practicable.

3. The Trustee may from time to time apply to the use of the Settlor's said husband and descendants or any of them, so much of the principal of the trust as in its discretion it may deem advisable for their proper education, care, comfort, support, or advancement in life.

4. The Trustee shall defer delivery of principal payable to a minor until the minor comes of age, but in its discretion may apply to his or her use so much of such principal or of the income thereof as it may deem advisable. The Trustee may make payment of income or principal applicable to the use of a minor to the minor's parent or guardian, or to the minor or by expending it for his or her benefit; and may accumulate for the minor's benefit so much of such income as it may deem unnecessary for his or her proper education, maintenance, and support.

5. No assignment or order by any beneficiary by way of anticipation of any part of the income of the trust herein created shall be valid, but the income shall be paid by the Trustee direct to the person entitled to receive it without power of anticipation or deposited to the beneficiary's account in som bank of good standing and repute without regard to any assignment or order; nor can the principal or income of said trust become attached by Trustee process or garnishment or other legal proceedings while in the hands

12 of the Trustee, except to the extent permitted by the laws of New York.

6. Upon the termination of any estate hereunder accrued income shall belong to the next estate. The Trustee may hold the trust corpus in one or more consolidated funds in which separate shares shall have undivided interests. The Trustee without increase or decrease of liability, may register stocks or bonds in the name of its nominee without describing the trust or may hold the same in bearer form. The Trustee shall not amortize premiums paid for trust securities nor take any account of discounts; stock dividends shall be considered as principal; commissions of the Trustee, whether on income or principal, other than termination charges shall be a first charge against income; in other respects the Trustee's determination shall be conclusive as to whether any payment received or charge incurred shall be credited to or charged against income or principal.

7. Any judgment rendered for or against the Trustee by any court having competent jurisdiction, in any action affecting this trust agreement or based on the existence thereof shall be conclusive and binding on all parties interested directly or contingently, beneficially or otherwise, under the terms of this agreement and any payment or payments made by the Trustee pursuant to the terms of any such judgment shall operate as a full release and discharge to the Trustee for the amount of any such payment or payments and all expenses incidental thereto.

13 8. The Trustee may at any time resign as trustee hereunder by an instrument in writing executed by it provided that it shall send notice of such resignation by registered letter addressed to the Settlor, or if she it not then living, to such of the beneficiaries then entitled to income hereunder as shall have then attained the age of twenty-one (21) years at her or their last address of which the Trustee shall have been advised. The resignation of the Trustee shall take effect at the time specified in such notice, but no sooner than forty days after the mailing of such registered letter unless theretofore accepted by the Settlor or if she is not then living, by a majority of the said beneficiaries. In the event of such resignation, the Settlor, or if she is not then living, a majority of the said beneficiaries may, by an instrument in writing executed by her or them and delivered to the Trustee appoint a successor trustee or trustees hereunder.

9. Should any married woman be a beneficiary hereunder, whether of income or principal, the Trustee may accept her sole and separate receipt as though she were unmarried, for any payment or payments made by it pursuant to the provisions hereof and such receipt shall be a full and sufficient discharge to the Trustee for such payment or payments.

10. The Settlor reserves to herself and at her death to her husband, Samuel James, if then living, the option to direct the Trustee in writing to issue voting proxies for and retain, sell, ex-

14 change, invest, reinvest, lease, mortgage, or improve any of the trust property held hereunder in such manner as she or he may so direct and without liability to the Trustee for resulting loss. Subject to the exercise of such option the Trustee during the continuance of the trust and until actual distribution of the property, shall have full authority in its discretion; to retain property coming into its hands in the same form as received by it and to hold, invest, and reinvest the trust fund from time to time held hereunder in such Government, State, and municipal bonds of any government, State, or municipality, that shall not have defaulted in payment previously to the date of execution of this trust; to borrow money for the benefit of the trust; to sell, lease, mortgage, pledge, improve, or exchange any property real or personal held hereunder for such price and upon such terms and conditions as may to it seem advisable; and to deal on behalf of the trust with any subsidiary or affiliate including The National City Company, without in-

crease of liability and as freely as though dealing with an independent third party. The Trustee in its discretion may purchase property from or lend money to the Settlor's estate with or without security and without liability for loss.

11. The Settlor reserves to herself the right to direct the Trustee in writing to keep or deposit for safekeeping any or all of the property from time to time held hereunder in such one or more of the Trustee's foreign branches or of the foreign offices or branches of any of its affiliates or in such foreign institution or institutions as she may direct but the Trustee shall be under no liability for loss resulting from compliance with such direction by the Settlor.

12. The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James, during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final; and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the Trustee shall not be substantially increased without its written consent.

13. The trust shall take effect upon acceptance by the Trustee and in all respects shall be governed by New York laws.

In witness whereof, the Settlor has hereunto set her hand and seal and the Trustee has caused these presents to be executed by its duly authorized officers and its corporate seal to be hereunto affixed as of the day and year first above written.

(Signature) GERTRUDE FELDMAN JAMES [L.S.]
CITY BANK FARMERS TRUST COMPANY,
By W. W. HOFFMAN.

Attest:
Asst. Secretary.

REPUBLIC OF FRANCE,
City of Paris, ss:

Be it remembered that on this fourteenth day of January 1930, at the city of Paris, aforesaid, before me G. A. Dixon, a commissioner of deeds for the State of New York in the said city of Paris, and there residing, personally came Gertrude Feldman James to me known to be the individual described in and who executed the within instrument and acknowledged to me that he executed the same.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

G. A. DIXON.

[SEAL]

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of February 1930, before me personally came W. W. Hoffman, who being by me duly sworn said that he
17 resides in New York City that he is one of the vice presidents of the National City Bank of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation, that the seal affixed to the said instrument is such corporate seal and was so affixed by authority of the board of directors of the said corporation, and that he signed his name thereto by like authority.

[SEAL]

HAROLD SWENSON,
Notary Public, Kings Co.

Exhibit B, to foregoing petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Apr. 7, 1933.

Address reply to Commissioner of Internal Revenue, and refer to MT-ET-Cl-NR-26147-SEM.

District of Second New York. Estate of Gertrude Feldman James. Date of death—May 20, 1931. City Bank Farmers Trust Company, trustee.

ESTATE OF GERTRUDE FELDMAN JAMES,
22 William Street, New York, New York.

18 SIRS: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of January 18, 1933. The deficiency in Federal estate tax hereby determined amounts to $11,840.03, and is fully explained in the attached statement, consisting of one page, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the collector of internal revenue, no claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to
19 file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed form 890, (1) waiving the restrictions on the assessment and collection of such deficiency and (2) consenting to the assessment and collection thereof, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

DAVID BURNET,
Commissioner.
By (Sgd.) R. M. ESTES,
R. M. Estes,
Deputy Commissioner.

Enclosures:

Statement.
Waiver—Form 890.

VRL

MT-ET-Cl-NR-26147-SEM-Second New York.
Estate of Gertrude Feldman James.

The protest relates to the inclusion of the several items described under schedule E of the return in the gross estate.

After due consideration it is determined that these items
20 are properly included in the gross estate as coming within the purview of section 302 (d) of the Revenue Act of 1926, therefore, the protest is overruled.

The final determination of the Bureau is shown in the following computation:

	Returned	Tentatively determined	Determined
Gross estate	$0.00	$383,500.00	$383,500.00
Deductions	0.00	0.00	0.00
Net estate	0.00	383,500.00	383,500.00
Gross tax	0.00	11,840.03	11,840.03
Credit for State estate, inheritance, legacy, or succession taxes	0.00	0.00	0.00
Net tax	0.00	11,840.03	11,840.03
Deficiency			11,840.03

21 Before United States Board of Tax Appeals

[Title omitted.]

Answer

The Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, general counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Denies so much of paragraph 1 of the petition as alleges that Gertrude Feldman James, deceased, as an alien of the United States and a resident and subject of the Kingdom of Great Britain. Admits all other allegations contained in paragraph 1 of the petition.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. (a), (b), and (c) Admits the allegations contained in
22 In re: Appeal, Estate of Gertrude Feldman James, No. 72522, paragraph 5 (a), (b), and (c) of the petition.

5. (d) and (e) Denies the allegations contained in paragraph 5 (d) and (e) of the petition.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is respectfully prayed that the determination of the Commissioner be approved

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
LEWIS S. PENDLETON,
Special Attorney,
Bureau of Internal Revenue.

lms-7/18/33

23 Before United States Board of Tax Appeals

[Title omitted.]

Stipulation as to facts

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective counsel, that the following is a true and correct statement of the facts of this case, all of which facts are hereby admitted without proof and are to be deemed the facts of this case, and the exhibits referred to herein and annexed to the petition herein may be admitted and received in evidence without requiring the production of the originals, viz:

1. The petitioner herein, City Bank Farmers Trust Company, a corporation duly organized and existing under the laws of the State

of New York, has its principal place of business at No. 22 William Street, in the Borough of Manhattan, city, county, and State of New York, and is trustee of the trust hereinafter mentioned.

24 2. The said Gertrude Feldman James died on or about the 20th day of May 1931. At the time of her death she was a nonresident of the United States. By an agreement bearing date the 21st day of February 1930 said Gertrude Feldman James transferred certain property, described in a schedule thereto annexed, to said City Bank Farmers Trust Company, as trustee thereunder. A copy of said trust agreement is annexed to the petition herein and marked "Exhibit A."

3. The notice of deficiency, a copy of which is annexed to the petition herein and marked "Exhibit B", was mailed to said petitioner, City Bank Farmers Trust Company, on April 7, 1933, which date said notice bears.

4. The tax in controversy is the Federal estate tax upon the estate of said decedent, and the sum involved is $11,840.03.

5. By paragraph 12 of the agreement creating said trust, the decedent had a conditional right to modify, alter, or revoke the same, this right, however, being expressly conditioned upon the consent in writing of the trustee and of Samuel James, decedent's husband, during his life, and after his death, upon the consent in writing of the trustee and Frank Samuel James, the settler's brother-in-law.

6. Said Samuel James and Frank Samuel James both survived said Gertrude Feldman James and neither of them nor said City Bank Farmers Trust Company ever gave any consent to a revo-

25 cation or alteration of said trust or to a change of any beneficial interest therein.

7. The said trust was in full force and effect at the date of the death of said Gertryde Feldman James.

8. The only issue for adjudication herein is the question of whether the property constituting said trust fund and upon the transfer of which said tax was determined to be due by the respondent herein, was properly included as a part of the gross estate of said decedent.

Dated, this 13th day of October, 1933.

EDWARD W. CAMERON,
Counsel for Petitioners.

(Signed E. BARRETT PRETTYMAN,
Counsel for Respondent.

26 Before United States Board of Tax Appeals

[Title omitted.]

Affidavit of P. A. Miller

STATE OF NEW YORK,
County of New York, ss:

P. A. MILLER, being duly sworn, deposes and says, as follows: I am a trust officer of City Bank Farmers Trust Company, the

trustee of a trust created by Gertrude Feldman James by trust agreement dated February 21, 1930, and am in charge of the said trust in behalf of said trustee.

Both of the persons whose lives measure the trust survived said Gertrude Feldman James, and are now living to the best of my information and belief,

Neither Samuel James, Frank Samuel James nor City Bank Farmers Trust Company ever gave any consent to a revocation or alteration of said trust or to a change of any beneficial interest therein; nor was any such action ever attempted by said Gertrude Feldman James.

The said trust was in full force and effect at the date of death of said Gertrude Feldman James and is still in full force and effect.

P. A. MILLER.

Swern to before me this 13th day of October, 1933.

THOMAS I. FITZGERALD,
Notary Public, New York County.

N. Y. Co. Clk.'s No. 105, Reg. No. 5F314.
Commission expires March 30, 1935.

Before United States Board of Tax Appeals

Docket No. 72522

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, Deceased, Dated February 21, 1930, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Promulgated February 21, 1934

The decedent on February 21, 1930, conveyed certain property in trust, reserving to herself the income for life. The trust was revocable only with the consent of her husband, who was a bene-
28 ficiary. Held, that the property conveyed in trust is not includable in her gross estate.

Edward M. Cameron, Jr., Esq., and George H. Craven, Esq., for the petitioner.

L. S. Pendleton, Esq., for the respondent.

Opinion

SMITH: This proceeding involves a deficiency in the estate tax of Gertrude Feldman James, deceased, in the amount of $11,840.03. The only question at issue is whether the value of certain securities which the petitioner conveyed in trust prior to her decease was a part of her gross estate for estate tax purposes.

The essential facts have been stipulated. The decedent died a nonresident of the United States on May 20, 1931. Prior to her death and by a certain agreement bearing date of February 21, 1930, she transferred certain securities, consisting principally of stocks and bonds, to the City Bank Farmers Trust Co., as trustee, for the uses and purposes as follows:

1. To hold, invest, reinvest and keep the said trust property invested during the lives of Vera Nanette James, daughter of the Settlor and of Samuel James, husband of the Settlor, and Peggy Florence James, daughter of the Settlor and of the said Samuel James, that is, until the death of the survivor of the said Vera Nanette James and Peggy Florence James, said period being hereinafter designated as the "Trust period"; to collect the rents, issues, and profits thereof and to apply the income from said
29 trust property to and for the use of the Settlor until her death or until the termination of the trust period, whichever event shall first occur, and upon and after the death of the Settlor prior to the termination of the trust period, to hold the said trust property and apply the income thereof as follows:

A. To apply the income thereof to the use of the said Samuel James, husband of the Settlor, if then living, until his death or until the termination of the trust period, whichever event shall first occur, or, if not then living, or upon his death prior to the termination of the trust period, to divide the principal into so many equal shares that there shall be one for each child of the Settlor and of the said Samuel James then living and one for the descendants then living of a deceased child of the Settlor and of the said Samuel James and to dispose of the income and principal of said shares as follows:

(a) To apply the income of each share held for a child of the Settlor and of the said Samuel James to the use of such child until his or her death or until the termination of the trust period, whichever event shall first occur, and upon his or her death prior to the termination of the trust period, to pay over the principal of such share to such child's descendents and in such proportions as such child may have appointed by will and to pay over any part not effectively so appointed in equal parts per stirpes to his or her descend-
30 ants then living or if none, in equal parts per stirpes to the surviving children of the Settlor and of the said Samuel James and the descendants then living of a deceased child of the Settlor and of the said Samuel James or, if none be then living, to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

(b) To pay over the principal of a share set apart for the descendants of a deceased child, in equal parts per stirpes, to such descendants.

B. Upon the termination of the trust period, to pay over the principal of the trust fund to the said Samuel James, if then living, or if not, to the Settlor, if then living, or if not, to such beneficiaries

as shall then be receiving income according to the provisions of paragraph 1. A. (a) hereof, and in the same proportions as provided therein for the distribution of income, or if no such beneficiaries be then living, then to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

* * * * * * *

3. The Trustee may from time to time apply to the use of the Settlor's said husband and descendants or any of them, so much of the principal of the trust as in its discretion it may deem advisable for their proper education, care, comfort, support, or advancement in life.

* * * * * * *

31 12. The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided, however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James, during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the Trustee shall not be substantially increased without its written consent.

The respondent has determined, as stated in his deficiency notice, that the value of the property so conveyed in trust is includable in the decedent's gross estate "as coming within the purview of section 302 (d) of the Revenue Act of 1926." The pertinent provisions of section 302 read as follows:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

32 (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.

Under the terms of the trust instrument the decedent retained a power to alter or revoke the trust, but only with the written consent of the trustee and of her husband, Samuel James, if living, or, if deceased, his brother, Frank Samuel James. The Supreme Court

has held, in Reinecke v. Northern Trust Co., 278 U. S. 339, that, where the grantor's right to alter or revoke the trust can be exercised only with the consent of one having a beneficial interest therein, the gift is complete and the property is not taxable in the grantor's estate for estate tax purposes. The court there said:

* * * He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

We have since held that Reinecke v. Northern Trust Co., su-
33 pra, which arose under the Revenue Act of 1921, is controlling in cases arising under the Revenue Acts of 1924 and 1926 and that the language "through the exercise of a power either by the decedent alone or in conjunction with any person, to alter, amend, or revoke" contained in section 302 (d) should be construed to mean "any person not a beneficiary of the trust." See Colonial Trust Co., et al., Executors, 22 B. T. A. 1377; Estate of Irving Lee Stone, et al., Executors, 26 B. T. A. 1; Carl F. Holmes, 27 B. T. A. 660; David J. Lit, et al., Executors, 28 B. T. A. 853, and cases therein cited. As to what constitutes a revocable trust under sections 166 and 167 of the Revenue Act of 1928, see Smith v. Commissioner, 59 Fed. (2d) 56; Bessie R. Jones, 27 B. T. A. 171; Iola Wise Stetson, 27 B. T. A. 173.

There can be no doubt that the decedent's husband, Samuel James, was a beneficiary of the trust in question. After the death of the grantor he was to receive the income from the trust for life or for the remaining term of the trust. The facts are that the grantor died in 1931 and that Samuel James has since received and is still receiving the entire trust income. Under clause 3 of the trust agreement above shown the trustee was authorized to apply so much of the principal of the trust fund as it deemed advisable to his, Samuel James', "care, comfort, support or advancement in life." Under clause B he was entitled upon the termination of the trust, if then living, to receive the entire principal of the trust fund.

It follows that the enjoyment of the trust property was not
34 subject at the time of the decedent's death to any change through the exercise of any power to alter or revoke within the meaning of section 302 (d) of the act.

We are of the opinion that the respondent erred in including the value of the trust property under consideration in the decedent's gross estate.

Reviewed by the Board.

Judgment will be entered for the petitioner.

Before United States Board of Tax Appeals, Washington

Docket No. 72522

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, deceased, dated February 21, 1930, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated February 21, 1934, it is

35 Ordered and decided that there is no deficiency in estate tax. Enter,

(Signed) CHARLES P. SIMON,
Member.

In United States Circuit Court of Appeals for the Second Circuit
[Title omitted.]

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal
36 Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, general counsel, Bureau of Internal Revenue, and Lewis S. Pendleton, special attorney, Bureau of Internal Revenue, and respectfully shows:

I

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is a corporation duly organized and existing under the laws of the State of New York with its principal place of business at no. 22 William Street, in the Borough of Manhattan, city, county, and State of New York, and is trustee of the trust hereinafter mentioned. The Federal estate tax return for the estate of Gertrude Feldman James, deceased, was filed by the taxpayer in the office of the collector of internal revenue for the second district of New York, customhouse, New York, New York.

That the court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

The nature of the controversy is as follows, to wit: On February 21, 1930, Gertrude Feldman James (hereinafter referred to
37 as the decedent) executed an instrument in writing whereby she transferred certain securities to the taxpayer to be held in trust until the death of the survivor of her two daughters. During the continuance of the trust the income was to be paid to the decedent for life and after her death to her husband, Samuel James, if then living for the duration of his life and after his death to their then living children and to the then living descendants of any deceased child. Upon the termination of the trust period, that is to say, upon the death of the survivor of the two daughters, the trustee was directed to pay over the principal of the fund to the husband, if then living, for the duration of his life and after his death to such beneficiaries as should then be receiving the income. The trust also provided that the decedent should have the right at any time during her life to modify, alter, or revoke the agreement with the consent of the trustee and of her husband.

The decedent died on May 20, 1931. The taxpayer, as trustee of the above-mentioned trust, filed a Federal estate tax return wherein it disclosed, but did not include for tax, the securities transferred under the aforesaid trust agreement. In determining the Federal estate tax on the decedent's estate, the Commissioner included in the gross estate the sum of $383,500.00 representing the value on the date of death of the securities transferred in trust. As the result of this adjustment the Commissioner notified the taxpayer that there was a deficiency proposed for assessment against it of $11,-840.03. The taxpayer filed a petition with the United States
38 Board of Tax Appeals and in due course a hearing was had. On February 21, 1934, the Board promulgated its opinion holding that the Commissioner had erred in including the value of the trust property in the decedent's gross estate and on February 27, 1934, entered its decision determining that there was no deficiency in estate tax.

III

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in determining that $383,-500.00, representing the value of the securities transferred to the taxpayer under the trust agreement dated February 21, 1930, should be excluded from the gross estate.

2. The Board of Tax Appeals erred in failing and refusing to find that the transfer of said securities was intended to take effect in possession or enjoyment at or after death within the meaning of secion 302 (c) of the Revenue Act of 1926.

3. The Board of Tax Appeals erred in failing and refusing to find that the enjoyment of said securities was subject to change at the date of the decedent's death through the exercise of a power either by the decedent alone or in conjunction with any person to

alter, amend, or revoke the meaning of section 302 (d) of the Revenue Act of 1926.

4. The Board of Tax Appeals erred in determining that there was no deficiency in estate tax.

39 5. The Board of Tax Appeals erred in failing and refusing to determine that there was a deficiency in estate tax due from said taxpayer of $11,840.03.

Therefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(Signed) FRANK J. WIDEMAN,
Assistant Attorney General.
(Signed) ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
(Signed) LEWIS S. PENDLETON,
Special Attorney,
Bureau of Internal Revenue.

40 [*Duly sworn to by Lewis A. Pendleton, jurat omitted in printing.*]

41 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Notice of filing petition for review

To CITY BANK FARMERS TRUST COMPANY,
No. 22 William Street, New York, New York.
EDWARD M. CAMERON, JR., Esq.,
20 Exchange Place, New York, New York

You are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of May, 1934, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition

42 for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 5th day of May, 1934.

(Signed) ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10th day of May, 1934.

CITY BANK FARMERS TRUST CO.,
Trustee,

(Signed) P. F. MILLER, *Trust Officer,*
Respondent on Review.

(Signed) EDWARD M. CAMERON,
Attorney for Respondent on Review.

43 In the United States Circuit Court of Appeals, for the Second Circuit

[Title omitted.]

Praecipe for record

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connections with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

44 2. Pleadings before the Board:

(a) Petition, omitting schedule A (list of securities) from exhibit A.

(b) Answer.

3. Stipulation of facts.

4. Opinion and decision of the Board.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel,
For the Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 18th day of June, 1934.

(Signed) EDWARD M. CAMERON, JR.,
Attorney for Respondent.

45 [Clerk's certificate to foregoing transcript omitted in printing.]

46 In United States Circuit Court of Appeals, for the second Circuit

[Title omitted.]

Stipulation and addition to record

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled case that the schedule hereto annexed is a true and correct copy of schedule A which was referred to and attached to the trust agreement marked "Exhibit A Annexed to Foregoing Petition" appearing on pages 8 to 17 of the printed transcript of record in the above-entitled case; that the annexed schedule, as part of said trust agreement, was a part of the record in said case before the Board of Tax Appeals, and that said schedule and this stipulation may be filed as a part of the
47 record in the above-entitled case in the United States Circuit Court of Appeals for the Second Circuit.

Dated, November 8, 1934.

FRANK J. WIDEMAN,
Assistant Attorney General,
Counsel for Petitioner.
EDWARD M. CAMERON, JR.,
Counsel for Respondent.

So Ordered:
MANTON,
U. S. C. J.

Schedule A

$20,000 City of Brisbane, 5% Sinking Fund Gold Bonds, March 1, 1957.
$25,000 Kingdom of Norway, 5% External Sinking Fund Gold Bonds, March 15, 1933/63.
$24,000 Republic of Colombia, 6% External Sinking Fund Gold Bonds, Oct. 1, 1928/61.
$1,500 Mortgage Bank of Chile, 6% Guaranteed Sinking Fund Gold Bonds, Apl. 30, 1928/61.
$20,000 United States Brazil 6½% External Gold 'onds, October 1, 1957.
$5,000 Nord Railway Co. 6½% External Sinking Fund Gold Bonds, Oct. 1, 1950.
$4,000 Peruvian National Loan, 6% External Sinking Fund Gold 'onds, Oct. 1, 1961.
$10,000 Paris Orleans Railroad Co., 5½% External Sinking Fund Gold Bonds, March 1, 1968.
48 $10,000 Dominican Republic Customs Administration, 5½% 20 year Sinking Fund Gold Bonds, March 1, 1942.
$19,500 Republic of Cuba, 5½% External Sinking Fund Gold Bonds, Jan. 15, 1953.
$7,000 Oriental Development Co., Ltd., 6½% External Gold Debentures, Nov. 1, 1958.
$5,000 Oriental Development Co., Ltd., 6% External Gold Debentures, March 15, 1953.

$15,000 Berlin Electric Elevated & Underground Railways, 6½% Gold Bonds, Oct. 1, 1956.
$20,000 City of Vienna, 6% External Sinking Fund Gold Bonds, Nov. 1, 1952.
$5,000 United States of Brazil, 6½% External Sinking Fund Bonds, Oct. 15, 1957.
$5,000 City of Milan, 6½% External 1927 Loan, Sinking Fund Gold Bonds, Apl. 1, 1952.
$1,000 Kingdom of Belgium, 7% External Sinking Fund Gold Gold Bonds, Oct. 1, 1956.
$20,000 Finnish Guaranteed Municipalities Loan of 1924, 6½% External Sinking Fund Gold Bonds, October 1, 1954.
$30,000 Canadian Pacific Rly. Co., 4½% Collateral Trust Gold Bonds of Sep. 1, 1946.
$5,000 Government of Argentine, 6% External Sinking Fund Gold Bonds, Oct. 1, 1960.
$10,000 Republic of Peru, 7% secured Sinking Fund Gold Bonds, Sept. 1, 1959.
$24,000 Kingdom of Italy, 7% External Sinking Fund Gold Bonds, December 1, 1951.
$20,000 Mortgage Bank of Chile, 6¾% Guaranteed Sinking Fund Gold Bonds, June 30, 1961.
$10,000 Dominion of Canada, 4½%, February 1, 1946.

49 *Stipulation*

$8,000 St. Maurice Valley Corporation, 1st & Coll. A, 6% Bonds, Dec. 1, 1945.
$10,000 State loan of Kingdom of Hungary, 7½% Sinking Fund Gold Bonds, Feb. 1, 1944.
$23,000 Govt. of Argentine, 6% Sinking Fund Gold Bonds (External), Dec. 1, 1959.
$15,000 Govt. of Japan, 6½% Sinking Fund Gold Bonds, Feb. 1, 1954.
$22,000 Commonwealth of Australia, 5% External Gold Bonds, July 15, 1955.
$20,000 Republic of Haiti, Customs & General Reserves, 6% S. F. Gold Bonds, Oct. 1, 1952 (Series A).
$5,000 Republic of Haiti, Customs & General Reserves, 6% Sinking Fund Gold Bonds, October 1, 1953 (Series C).
$2,000 Government of Sweden, 5½% Gold Bonds, November 1, 1954.
$9,500 Paris Lyon Mediterranean Rly. Co., 6% External Sinking Fund Gold Bonds, August 15, 1958.
$36,000 Dominion of Canada, 5% Refunding Gold Bonds, May 1, 1952.
$10,000 State of Sao Paulo (External Water Works loan of 1926), 7% secured Sinking Fund Gold Bonds, September 1, 1956.
$6,000 Canadian Pacific Rly. Co., 4% Perpetual Consolidated Debenture Stock.

50 In United States Circuit Court of Appeals for the Second Circuit

No. 114. October term, 1934

Argued Nov. 21, 1934. Decided Dec. 17, 1934

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, Deceased, respondent

Appeal from the Board of Tax Appeals

Before MANTON L. HAND, and SWAN, Circuit Judges

Petition to review a decision of the United States Board of Tax Appeals (29 B. T. A. 1141.) Petitioner appeals. Affirmed.

Frank J. Wideman, Asst. Atty. Gen., and Sewall Key and Helen R. Carloss, Sp. Assts. to Atty Gen., for petitioner.

Taylor, Blanc, Capron & Marsh, and Edward M. Cameron, Jr., all of New York City (Russell L. Bradford and George H. Craven, both of New York City, of counsel), for respondent.

Opinion

MANTON, Circuit Judge:

This petition presents the question of whether a deficiency in Federal estate tax is due from the Trustee named in a trust agreement made by Gertrude Feldman James, now deceased. The Board of Tax Appeals decided against the Commissioner (29 B. T. A. 1141), and he petitions for a review. Sections 1001–1003 of the Revenue Act of 1926, 44 Stat. 9, c. 27, and section 1001 (a), as amended by section 1101 (a) of the Revenue Act of 1932, 47 Stat. 169, c. 209 (26 U. S. C. A., §§ 1224–1226.)

The petitioner's claim is that the corpus of the trust created by the decedent in 1930 should be included in her gross estate for taxation. Section 302 (c) or (d) of the Revenue Act of 1926, 44 Stat. 9, c. 27 (26 U. S. C. A., §§ 1094 (c, d).

Gertrude Feldman James, a nonresident of the United States, died May 20, 1931, after she had transferred on February 21, 1930, certain foreign securities in trust for certain purposes during the lifetime of her two daughters, or the survivor of them. The income of the trust was to be paid to her for life or until the termination of a trust, whichever occurred first. If she died before such termination, the income was to be paid to her husband, Samuel James, so long as he lived, or until the termination of the trust. If he died prior to the termination of the trust, the principal was to be divided into as many shares as there were children of the grantor and Samuel James then living, plus one share for the descendants then

living of any deceased child. The income of each share was to be applied to the use of such child during his life or until the end of the trust, whichever should occur first, and upon his death prior to the termination of the trust the principal was to be paid to his descendants in such proportions as he had appointed by will, and any part not so appointed was to be paid to his descendants, if living, in equal parts per stirpes and not per capita. If no descendants of such child were living at that time, the principal was to be paid in equal parts per stirpes and not per capita to the surviving children of the settler and Samuel James and the descendants of any deceased
51 child, or, if none were living, to such persons as should then constitute the heirs at law of Samuel James, according to the laws of New York then governing the descent of real estate. Upon the termination of the trust, the principal was to be paid to Samuel James, if then living; if not, to the Settlor if then living, or, if not, to such beneficiaries as were then receiving the income as outlined, in the same proportion, or, if no such beneficiaries were then living, to the heirs of Samuel James according to the laws of New York governing the descent of real estate.

Paragraph 12 provided:

"The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided, however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose, but the duties and liabilities of the trustee shall not be substantially increased without its written consent."

When the Settlor died, May 20, 1931, her husband survived.

Thus, under the provisions of this trust, the interest of Samuel James was the income for life, after the death of the Settlor, with right to the corpus whenever the trust terminated. Moreover, there was a discretion placed in the trustees at any time during the term of the trust to use for his support, care, comfort, and advancement in life any part of the principal of the trust as the trustees saw fit. In any case, the term of the trust was the lives of the two daughters, or the survivor of them. The power to revoke was a limitation of the benefits to be given to the children under the trust. The Settlor's death removed these limitations since the possibility of revocation then terminated, and the trust would continue during their lives, if they survived their father, Samuel James. If not,

their father Samuel James received the principal. The Settlor's will to preserve the limitations ended with her death. The economic benefit would pass to the children if and when they survived their father by her death, providing the corpus was not used, as permissible, for Samuel James' "care, comfort, support or advancement in life." Her death would then become the generating source within the authorities. Tyler v. United States, 281 U. S. 497, 50 S. Ct. 356, 74 L. Ed. 991, 69 A. L. R. 758.

Section 302 (d) of the Revenue Act 1926 (26 U. S. C. A., § 1094 (d) requires that there shall be included in the decedent's gross estate the value of any property of which the decedent has at any time made a transfer by trust, where the enjoyment was subject, at the date of death, to any change through the exercise of a power either in the decedent alone "or in conjunction with any person" to alter, amend or revoke the trust. While the decedent in her trust reserved the right to revoke or modify the trust in conjunction with her husband, if living, and the trustee, and after the husband's death, in conjunction with the trustee and her husband's brother, still, if the trust were terminated, the corpus passed to the husband if living and to the children if he were not living. The statute is clear and comprehensive. It is sufficient if there is a power in the grantor to alter or amend the trust even if the Settlor may make no change for his benefit. Porter v. Commissioner, 288 U. S. 436, 53 S. Ct. 451, 77 L. Ed. 880.

We have held that a provision in the trust agreement for a trustee's consent to a revocation did not void the tax. Witherbee v. Commissioner (C. C. A.), 70 F. (2d) 696. But the Supreme Court held in Reinecke v. Northern Trust Co., 278 U. S. 399, 49 S. Ct. 123, 125, 73 L. Ed. 410, 66 A. L. R. 397, that, where the Settlor established two trusts in which he reserved a power of revocation to himself alone, the value of such trusts should be included in the decedent's gross estate for tax purposes, but that in five trusts where revocation was reserved to the Settlor only with the consent of some beneficiary, the corpus of such trusts were not to be included within the decedent's estate, for taxation purposes. The reason given by the court was that the Settlor could effect no change in the
52 beneficial interests in the trust without the consent of the beneficiary, and the court said:

"Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute. * * * The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax."

See, also, Lit v. Commissioner (C. C. A.) 72 F. (2d) 551.

And in Reinecke v. Smith, 289 U. S. 172, 53 S. Ct. 570, 572, 77 L. Ed. 1109, the rule announced in the Northern Trust Co. case, supra, was again affirmed, the court saying:

"The tax was upheld as applied to the corpus of trust over which the grantor had sole power of revocation. It was, however, condemned as to those where revocation was dependent upon joint action of the grantor and the beneficiary, for the reason that the interest of the beneficiary was adverse and the grantor unable at will to alter or destroy the trust."

Settlor's husband was entitled to receive the income of the trust fund after her death, and, having survived the decedent, he received the full income. Thus his right to receive the full trust income was a beneficial and adverse interest. And upon the termination of the trust, regardless of whether or not the settlor should then be living, the corpus was payable to her husband. Other provisions, without limitation as to time, applied to the use by the husband of as much of the principal as might be deemed advisable for his care, comfort, and support. The interest of the husband in the principal was in no way contingent. Section 40, N. Y. Real Property Law (Consol. Laws, c. 50), provides that a future estate is vested when there is a person in being, who would have an immediate right to possession of the property, on the determination of all the intermediate or precedent estates. Moore v. Littel, 41 N. Y. 66; Matter of Barstow, 230 App. Div. 371, 244 N. Y. S. 588, affirmed 256 N. Y. 649, 177 N. E. 177.

As to the husband's interests, they were vested and adverse to the Settlor's. The control over the disposition of such of the trust property as might be measured as belonging to him, and its economic benefits, were not left in the hands of the settlor. "The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made." Reinecke v. Northern Trust Co., supra.

Nor was this transfer in contemplation of death within the provisions of section 302 (c) of the Revenue Act 1926 (26 U. S. C. A. § 1094 (c). The husband's property did not pass from the control, possession, or enjoyment of the Settlor at her death. The transfer was made not in contemplation of her death, but long prior to her death, without any reserve power of control over her husband's interests or the disposition thereof. Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772; Hoeper v. Tax Commissioner of Wisconsin, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. 248. As to the husband's interest, it cannot be said that the death of the settlor was the generating source from which authority to impose taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." Tyler v. United States, 281 U. S. 502, 50 S. Ct. 356, 358, 74 L. Ed. 991, 69 A. L. R. 758. The statute (section 302 (c) does not in terms relate to transfers in title at the time of death. The

reserving of income which is ended at death is not a transfer intended to take effect in possession or enjoyment at or after death. Helvering v. Duke, 290 U. S. 591, 54 S. Ct. 95, 78 L. Ed. 521; May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244; Commissioner v. Wallace (C. C. A.) 71 F. 1002.

In Lit v. Commissioner (C. C. A.) 72 F. (2d) 551, the Settlor established a trust to last for the lives of his wife and himself or the survivor. The Trustee was to pay the income of the trust to the wife for life and at her death to pay the income to the Settlor for life (him surviving). At the death of the survivor, the Trustee was to pay the corpus of the trust to the son. There were further provisions if the son were dead. The Settlor died leaving his wife and son surviving. The Settlor had reserved the power
53 to revoke with the consent of his wife. The Circuit Court of Appeals expressed itself as being in "entire accord with the reasoning and conclusions" set out in the decision of the Board of Tax Appeals (28 B. T. A. 853). The Board said that "any person" as used in section 302 (d) is not to be given a literal interpretation, but is to be read "any person not a beneficiary of the trust." It was held that the value of the wife's life estate could not be taxed since her interest was adverse and she had to consent to revocation. But the son's remainder interest was held to be taxable and to be included as part of the decedent's gross estate. The Settlor's power to revoke the remainder interest was not dependent upon securing the remainderman's consent. All the Settlor had to do was revoke in conjunction with his wife who had no adverse interest as to the remainder.

Therefore we conclude that Samuel James had an adverse interest and that, as to his interests in the trust fund, they could not be taxed under the statute. Nor do we think that the interests of their two daughters in the trust fund might be calculated and included as part of the corpus of the Settlor's gross estate.

While no one with an adverse interest could prevent the Settlor from exercising her will to the extent of altering or revoking the interests to be transferred to her daughters as created by the trust, and while until her death she had the power to destroy her daughters' interests, which were contingent on her continuing the will which created them, still in view of the permissible use of the entire corpus for the "care, comfort, support or advancement in life" of her husband and the right to use any or all of it at any time during his lifetime, it may well be that the daughters would never become entitled to any of the corpus of the trust. This uncertainty would render it unjust to tax the interest of the daughters so contingent. The death of the Settlor cannot be said to be the generating source of the children's interests. Tyler v. United States, supra. It may not be said that at the Settlor's death the contingency upon which those interests were based ended. It did not end because of the permissibility, at all times during the life of Samuel James, to use all of the corpus if conditions and circumstances reasonably required the

trustees to act in furtherance of the clause of granting "care, comfort, support or advancement in life" to Samuel James. It is only the creation of new interests, brought into being by the death of the Settlor, which may be properly taxed for a death duty.

We therefore conclude that no tax may be imposed and that the corpus of this trust fund may not be included in the gross estate of the Settlor for death taxes.

Order affirmed.

L. HAND, Circuit Judge, dissenting with opinion.

54 In United States Circuit Court of Appeals For the Second Circuit

No. 114. October term, 1934

Argued Nov. 21, 1934. Decided Dec. 17, 1934

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CITY BANK FARMERS' TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, Deceased, respondent

Appeal from the Board of Tax Appeals

Before MANTON, L. HAND, and SWAN, Circuit Judges

Dissenting opinion

L. HAND, Circuit Judge (dissenting):

It is not possible, I think, to read section 302 (d) of the Revenue Act of 1926 (26 U. S. C. A., § 1094 (d)), as the Board read it in Lit v. Commissioner, 28 B. T. A. 853; and as the Third Circuit did in the same case on appeal, 72 F. (2d) 551. The contrast between it and section 219 (g) of the act (26 U. S. C. A., § 960 note) is too strong an indication that Congress meant in each section exactly what it said; section 302 (d) covers powers whose exercise is conditional on the approval of the beneficiary, as well as of any one else. The statement in the committee reports (House Report 179; Senate Report 398), that section 302 (d) "is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust", refers only to the general policy of each section, and does not make the scope of each identical. We cannot escape deciding how far section 32 (d) is constitutional, taken literally. I must own that I might have thought that it was entirely so, if confined to gifts made after 1926. A tax upon a gift is an excise and within the competence of Congress. Bromley v. McCaughn, 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed. 226. I cannot conceive that it should make any difference what name is given to it; whether it

is classed as testamentary or inter vivos. Of couse its incidence is very different in each case; in the first the legatees bear it, in the second, the donees. Moreover if an estate tax, the value of the gift at the Settlor's death is added to his other property, and the legatees must pay not only upon the sum of both, but often at a higher rate; the tax might conceivably eat up the whole testamentary estate. Yet still I might not have found in all this anything objectionable under the fourteenth amendment. Donees and legatees are both mere volunteers, objects of the Settlor's bounty; they have not the slightest claim to equality of treatment from him, and, the gift being by hypothesis made with full knowledge of the law, I should think that its incidence might be taken as deliberately intended.

Therefore, even without any reserved power I might have thought section 302 (d) valid. In that I should however have been altogether wrong because of Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772. As to the equitable interests of the children, the addition of the power does make it valid, although the power was not absolute; but required the concurrence of two others, the husband and the Trustee. In the case of some conditions we could say with certainty when the power did or did not exist; for example the condition might be that the income from the gift must fall to two percent or less; in that case no power would ever exist, unless before the Settlor's death the income did fall so low. If it never did, the case would be throughout like Heiner v. Donnan, supra, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772. But in the case at bar the condition continued unascertainable for as long as the settlor lived
55 because no one could say, out of all the possible substitutes she might propose, that she could not persuade her husband and the Trustee to go along with any one. I think that is is on the taxpayer to meet this and show that the husband and the Trustee would never have concurred in any revocation the Settlor might make; otherwise the power was at least formally outstanding and her death was necessary finally to root the limitations beyond displacement. This is as I read Reinecke v. Smith, 289 U. S. 172, 53 S. Ct. 570, 77 L. Ed. 1109, and Witherbee v. Commissioner, 70 F. (2d) 696 (C. C. A. 2). Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, was different; there were no such powers, and no such statute.

Therefore, the interests not limited to the husband may be taxed, just as the Third Circuit held in Lit v. Commissioner, supra, 72 F. (2d) 551. However, the husband's own interests, disregarding that dependent on the Trustee's discretion, are no different from what they would have been, had the Settlor's power been wholly omitted. Under section 23 of the New York Personal Property Law (Consol. Laws, c. 41), just as in equity, the Settlor and the beneficiary might at any time have united to end his interest. So far Heiner V. Donnan, supra, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772, rules, and section 302 (d) is unconstitutional. There remains only his interest in the corpus, which the Trustees might take from his

children and give to him. Such an interest is not vested, even in the sense in which that word is used in New York, for it does not succeed upon the termination of the preceding estate. Moore v. Littel, 41 N. Y. 66. True, a contingent remainder is taxable if the testator's death ends the contingency (Klein v. U. S., 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996); but the same does not necessarily follow if it does not then end, as here. The question is therefore as to the person who must forecast an unpredictable event. My brothers think that the burden of proof should be upon the Treasury to show that the Trustee will not exercise its power, and that as that remains uncertain, there can be no tax. We do indeed recognize some juridical augurs, actuaries among others; and it is for this reason that we can conventionally apportion between the husband and the children the value of the res' here in suit, though nobody can tell which will in fact die first. But though we do effect such a prediction, we require some statistical background before we will, and there are no statistics as to a trustee's giving the principal of a fund to a life owner. In such a dilemma I think we should ignore the unascertainable possibility and treat the children's remainders as finally vested, just as we should ignore the unpredictable conditions on the Settlor's power to revoke. In each case there is a formally granted interest whose chances of displacement could not be calculated; in each we should ignore the possibility. I am quite aware that this is all largely matter of words, but so is much of the law of property; and unless we treat such formal distinctions as real, that law will melt away and leave not a rack behind. I would therefore add to the Settlor's testamentary estate the entire value of the gift, less the actuarial value of the husband's interests.

56 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CITY BANK FARMERS TRUST COMPANY AS TRUSTEE, ETC., RESPONDENT

Judgment

Filed Dec. 24, 1934

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

57 [File endorsement omitted.]

58 [Clerk's certificate to foregoing transcript omitted in printing.]

59 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File no. 39,433. U. S. Circuit Court of Appeals, Second Circuit. Term no. 10. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. City Bank Farmers Trust Company, as trustee under an agreement with Gertrude Feldman James, deceased. Petition for a writ of certiorari and exhibit thereto. Filed March 23, 1935. File no. 10 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE, 1935

FILE COPY

No. [redacted] 10

In the Supreme Court of the United States

October Term, 1934

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner

vs.

Guy Bard Plumbing Tank Co. (a Texas [illegible] corporation), Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

CITY BANK FARMERS TRUST CO., AS TRUSTEE UNDER an Agreement with Gertrude Feldman James, Deceased

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on December 24, 1934 (R. 58), affirming the decision of the Board of Tax Appeals.

QUESTIONS PRESENTED

1. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of the corpus of a trust created by the

decedent in 1930, where the grantor in conjunction with her husband, who had a life interest therein, and the trustee, had the power to revoke or modify the trust.

2. If so construed, whether Section 302 (d) violates the Fifth Amendment to the Constitution.

3. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of certain contingent remainder interests in a trust created by the decedent in 1930, where the grantor, in conjunction with her husband, who had a life interest therein, and the trustee, had the power to revoke or modify the trust.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of

his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

* * * * *

(U. S. C. App., Title 26, Section 1094.)

STATEMENT

The essential facts were stipulated and were found by the Board as follows:

The decedent, Gertrude Feldman James, died May 20, 1931, a nonresident of the United States (R. 28).

On February 21, 1930, she transferred certain securities to the City Bank Farmers Trust Company in trust for certain purposes during the lives of her two daughters, or the survivor of them (R. 28–29).

The income of the trust was to be paid to her until her death or until the termination of the trust, whichever should first occur (R. 28–29).

In the event that she died prior to the termination of the trust, the income was to be paid to the grantor's husband, Samuel James, so long as he lived or until the termination of the trust. If he died prior to the termination of the trust, the principal was to be divided into as many shares as there were children of the grantor and Samuel James then living, plus one share for the descendants then living of any deceased child. The income of each share was to be applied to the use of such child during his life or until the termination of the trust period, whichever should first occur, and, upon his death prior to the termination of the trust, the principal was to be paid to his descendants in such proportions as he had appointed by will, and any part not so appointed was to be paid to his descendants, if living, in equal parts *per stirpes* and not *per capita*. If no descendants of such child were living at that time, the principal was to be paid in equal parts *per stirpes* and not *per capita* to the surviving children of the settlor and Samuel James and the descendants of any deceased child, or if none were living, to such persons as should then constitute the heirs at law of Samuel James according to the laws of New York then governing the descent of real estate (R. 29–30).

In the case of any child who had predeceased the settlor, the principal of the share set apart for

her descendants was to be paid over to such descendants in equal parts *per stirpes* and not *per capita* (R. 30).[1]

Upon the termination of the trust, the principal was to be paid to Samuel James, if then living; and, if not, to the settlor, if then living; or, if not, to such beneficiaries as were then receiving the income as above outlined and in the same proportions; or, if no such beneficiaries were then living, to the heirs of Samuel James, according to the laws of New York governing the descent of real estate (R. 30).

The trustee was given authority from time to time to apply to the use of the grantor's husband and descendants so much of the principal as it deemed advisable for their proper "education, care, comfort, support or advancement in life", and was to defer delivery of principal to any minor, making payment of necessary amounts to his parent or guardian for his support, but in its discretion the trustee might apply to a minor's use so much of the principal as it might deem advisable (R. 11, 30).

The trust contained spendthrift provisions (R. 11–12) and provisions reserving to the grantor (or her husband after her death) certain powers in directing investments, etc. (R. 13–15).

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[1] Provided, of course, that neither the grantor nor her husband survived the termination of the trust. See next paragraph.

Paragraph 12 provided as follows (R. 15, 31):

> The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided however, that no such revocation, alteration or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said SAMUEL JAMES during his life and, after his death, of the Trustee and of FRANK SAMUEL JAMES, brother of the said SAMUEL JAMES, during his life and in case of disagreement between the Settlor and the CITY BANK FARMERS TRUST COMPANY, then the decision of the said SAMUEL JAMES or FRANK SAMUEL JAMES, as the case may be, shall be final; and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the trustee shall not be substantially increased without its written consent.

Samuel James, the husband of the settlor, survived his wife, whose death occurred prior to the termination of the trust, and the provisions of the trust instrument became effective as therein provided upon the happening of that contingency.

The Commissioner determined a deficiency in estate tax of $11,840.03, based upon his inclusion of the value of the corpus of the trust estate in the

decedent's gross estate under Section 302 (d) of the Revenue Act of 1926 (R. 20).

The Board reversed the action of the Commissioner, holding that Section 302 (d) did not apply. The Circuit Court of Appeals, one Judge dissenting, affirmed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Commissioner urges that the Circuit Court of Appeals erred:

1. In failing and refusing to find that the enjoyment of said securities was subject to change at the date of the decedent's death, through the exercise of the power, "either by the decedent alone or in conjunction with any person, to alter, amend, or revoke", within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. In failing and refusing to find that the value of certain contingent remainder interests in the trust created by the decedent in 1930 should be included in the gross estate of the decedent, where the grantor, in conjunction with her husband and the trustee, had the power to revoke or modify the trust.

3. In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The court below construed Section 302 (d) of the Revenue Act of 1926 as applying only to trusts created by a decedent in which was reserved the

power to revoke or amend the trust, either alone or in conjunction with *someone not a beneficiary* of the trust, though the statute plainly reads "alone or in conjunction with *any person.*" In so holding, the court restricted the application of a plain and unambiguous statute, which required no construction (*United States* v. *Mo. Pac. R. Co.,* 278 U. S. 269; *Ruggles* v. *Illinois,* 108 U. S. 526, 534; *Hamilton* v. *Rathbone,* 175 U. S. 414, 419), and amended the provision under pretense of construing it, contrary to the principle laid down by this Court in *Heiner* v. *Donnan,* 285 U. S. 312.

2. The question whether the statute, if construed literally, to include trusts in which the grantor must gain the consent of the beneficiary to revoke the trust, would violate the due process clause in the Constitution, is a question which has not been, but should be, decided by this Court. The decision in *Porter* v. *Commissioner,* 288 U. S. 436, upheld the validity of the provision as applied to trusts in which the grantor had no power to make a change in the trust to benefit himself, but in that case, the power of amendment which he did have could be exercised alone. See also *Cook* v. *Commissioner,* 66 F. (2d) 995 (C. C. A. 3d), certiorari denied, 291 U. S. 660. On October 8, 1934, the Court denied the petition for writ of certiorari in the case of *Witherbee* v. *Commissioner,* No. 220, October term, 1934, in which the Circuit Court of Appeals for the Second Circuit upheld the validity of the provision, where the grantor with the consent of

the trustee could revoke the trust (70 F. (2d) 696), but this Court had already determined that a trustee's interest is not an adverse interest. *Reinecke* v. *Smith*, 289 U. S. 172.

Nor was the question settled by the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. In that case the Court refused to construe a provision of the Revenue Act of 1921 relating to transfers intended to take effect at or after death as applicable to a trust where the grantor, with the consent of one or more beneficiaries, could revoke the trust, for the reason that it felt that such a construction was not compelled by the language employed and would raise doubts concerning the validity of the statute. The 1921 Act contained no provision analogous to Section 302 (d) of the 1926 Act, so that the Court did not pass upon the question here involved. See *Dort* v. *Helvering*, 69 F. (2d) 836 (App. D. C.), certiorari denied, October 8, 1934.

3. The decision below conflicts with the decision of the Circuit Court of Appeals for the Third Circuit in *Lit* v. *Commissioner*, 72 F. (2d) 551, insofar as it holds that the value of the entire trust is to be excluded from the gross estate of the grantor. In the *Lit* case, the court held that the wife's life estate could not be taxed, since she had to consent to revocation and her interest was adverse, but held the son's remainder interest to be taxable. The dissenting opinion in this case is in accord with the *Lit* decision, in holding that the corpus of the trust,

less the value of the husband's interest, should be included in the grantor's gross estate.

4. The provisions of Section 302 (d), which first appeared in the Revenue Act of 1924, were not amended by the Revenue Acts of 1928 and 1932, and (with a minor amendment) appear in the Revenue Act of 1934,[2] so that the questions here involved will continue to arise. Several similar cases are pending in the various Circuit Courts of Appeals, and it is highly desirable to have the questions determined by this Court.

The provision is regarded as an important one in the administration of the Federal estate tax laws, and a decision determining its applicability to cases where the grantor may revoke with the consent of the beneficiary is urgently required, both by the Treasury Department and by taxpayers generally.

Wherefore, it is respectfully submitted that this petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1935.

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[2] Revenue Act of 1924, c. 234, 43 Stat. 253, Section 302 (d) (U. S. C., Title 26, Section 1094); Revenue Act of 1934, c. 277, 48 Stat. 680, 752, Section 401.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 27–34) is reported in 29 B. T. A. 1141. The opinion of the Circuit Court of Appeals (R. 51) is reported in 74 F. (2d) 242.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming the Board of Tax Appeals, was entered December 24; 1934 (R. 58). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED, STATUTE INVOLVED, ETC.

A statement of the questions presented, statute involved, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT

Section 302 (d) of the Revenue Act of 1926, *supra*, provides that there shall be included in the decedent's gross estate the value of any property—

> of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date

> of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . .

In this case, the decedent created a trust in 1930, in which she reserved the right to revoke or modify the trust in conjunction with the trustee and her husband, who, under certain contingencies, would receive the income and/or the corpus of the trust. Thus, the case falls within the precise language of the statute which requires merely that the power of revocation or amendment shall be retained by the grantor "in conjunction with any person."

The Board of Tax Appeals and the court below construed the statute as if it read "in conjunction with any person not a beneficiary of the trust." But the statute was clear and unambiguous (see *Witherbee* v. *Commissioner*, 70 F. (2d) 696 (C. C. A. 2d), certiorari denied, October 8, 1934), and there was no room for interpretation. *Ruggles* v. *Illinois*, 108 U. S. 526, 534; *Lake County* v. *Rollins*, 130 U. S. 662; *Price* v. *Forrest*, 173 U. S. 410; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Caminetti* v. *United States*, 242 U. S. 470; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269. A statute may not be amended under pretense of construing it. *Heiner* v. *Donnan*, 285 U. S. 312.

The statute being clear, there is no justification for a resort to its legislative history; furthermore, the committee reports fail to justify the Board's assumption that it was the intention of Congress

to enact a provision relating to estate taxes identical with Section 219 (g) relating to income taxes. See H. Rep. No. 179, 68th Cong., 1st Sess., p. 28. There are two differences in the two provisions. Section 219 (g) of the Revenue Acts of 1924 and 1926[1] not only requires that in order to tax the income of a trust to the grantor he must exercise whatever power he has in conjunction with any person not a beneficiary, *but it also requires that his power must consist of the right to revest title in himself.* These differences the dissenting opinion in this case pointed to as an indication that Congress meant in Section 302 (d) exactly what it said (R. 56). If, in enacting Section 302 (d), Congress did not mean to require that the grantor should have the power to revest title in himself (*Porter* v. *Commissioner,* 288 U. S. 436) and had a contrary intention in Section 219 (g), it is reasonable to suppose that Congress did not mean to restrict the application of Section 302 (d) to cases where the power to revoke or amend must be exercised in conjunction with someone not a beneficiary of the trust, although Section 219 (g) was so restricted.

---

[1] Section 219 (g): "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

It is true that the Board has consistently taken the view which it took in this case.[2] A similar conclusion was reached by the Circuit Court of Appeals for the First Circuit in the case of *White* v. *Erskine*, 47 F. (2d) 1014 (but the reasoning of the court in that case was repudiated by this Court in *Porter* v. *Commissioner, supra*), and in *White* v. *Poor* (C. C. A. 1st), decided January 31, 1935, not officially reported but found in 1935 C. C. H., Volume 3, paragraph 9132. The Court of Appeals for the District of Columbia, in *Helvering* v. *Helmholtz*, decided December 31, 1934, not officially reported but found in Vol. I, Prentice-Hall, 1935, paragraph 678, adopted a similar construction.

In *Lit* v. *Commissioner*, 72 F. (2d) 551, the Circuit Court of Appeals for the Third Circuit, while adopting the reasoning of the Board of Tax Appeals, held that the value of the remainder in that case was subject to Federal estate tax. In this case the court held to the contrary, and, in this respect, is in conflict with *Lit* v. *Commissioner, supra*.* We submit that, as to the remainder interests, the life estate of the settlor's husband was not an adverse beneficial interest, and they should have been included in the settlor's gross estate, even though the

[2] Among other cases, see *Raegner* v. *Commissioner*, 29 B. T. A. 1243; *Stevens* v. *Commissioner*, 29 B. T. A. 641, now pending before the Circuit Court of Appeals for the Third Circuit; *Strauss* v. *Commissioner*, decided December 6, 1933, now pending before the Circuit Court of Appeals for the Seventh Circuit.

words of the statute, "in conjunction with any person", might be construed to mean "in conjunction with any person not a beneficiary of the trust", since, as is pointed out in the dissenting opinion (R. 57)—

> the husband's own interests, disregarding that dependent on the trustee's discretion, are no different from what they would have been had the settlor's power been wholly omitted.

We submit that, as the Circuit Court of Appeals for the Second Circuit held in the case of *Witherbee* v. *Commissioner, supra*, the statute clearly applies, and the only question is its validity.

In the case of *Porter* v. *Commissioner, supra*, this Court sustained the validity of Section 302 (d), as applied to a case in which the grantor alone had the power to modify the trust, though he could make no change which would benefit himself. In that case the Court said (pp. 444–445):

> But the reservation here may not be ignored; for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation

to ascertain the amount of what in Sec. 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells*, 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do. *Reinecke* v. *Northern Trust Co.*, *supra*. *Chase National Bank* v. *United States*, *supra*. *Tyler* v. *United States*, *supra*, 502. *Klein* v. *United States*, 283 U. S. 231. *Gwinn* v. *Commissioner*, 287 U. S. 224.

In *Witherbee* v. *Commissioner*, *supra*, the validity of the statute was sustained as applied to a case in which the grantor could revoke with the consent of one or more trustees, but the court there relied upon the decision of this Court in *Reinecke* v. *Smith*, 289 U. S. 172, holding that a trustee's interest is not adverse.

We believe that justification for the tax in a case where the consent of a beneficiary must be obtained for modification or revocation of the trust may be found in the principles which were applied by the Court in *Burnet* v. *Wells*, 289 U. S. 670. In that case the Court sustained an income tax imposed upon the grantor of an irrevocable trust, with respect to income from the trust used to pay premiums on insurance policies on his life. The Court there held that the possibility of evasion of taxes through the creation of trusts, in which the solidarity of the family was a factor, justified allowing a margin for the play of legislative judgment.

In trusts of the kind here involved, the grantor makes provision for members of his family, and places the power of revocation or amendment in himself and one or more of the members of the family who are beneficiaries. It is fairly obvious that this power is not created with the thought that it can never be exercised. Upon the death of the grantor, there ceases to be the possibility of a change in any beneficiary, and the gifts are for the first time complete. The transfer may reasonably be regarded as a substitute for a testamentary disposition. See *Porter* v. *Commissioner, supra.*

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the Court referred to a similar transfer as being complete when made. In that case, however, the Court was passing upon the applicability of a provision relating to transfers intended to take effect at or after death, similar to Section 302 (c) of the 1926 Act.[3] The case arose under the Revenue Acts (1918 and 1921) prior to the 1924 Act, in

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[3] Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

which first appeared Section 302 (d), which is identical with Section 302 (d) of the Revenue Act of 1926, here involved. This Court, in *Porter* v. *Commissioner, supra,* in construing and applying Section 302 (d) of the Revenue Act of 1926, distinguished the *Northern Trust Co.* case, and held it "not in point." This decision also overruled the decision in *White* v. *Erskine,* 47 F. (2d) 1014. The Court in *Reinecke* v. *Northern Trust Co., supra,* was not construing any provision analogous to Section 302 (d), and the Court did not pass upon the question here involved. As was pointed out in the dissenting opinion in this case, that case differed in that "there were no such powers and no such statute" (R. 57). Hence, the issue here involved was not decided in that case. See *Dort* v. *Helvering,* 69 F. (2d) 836 (App. D. C.), certiorari denied, October 8, 1934.

In this case the statute is not being applied retroactively, and the doctrine of *Nichols* v. *Coolidge,* 274 U. S. 531, does not apply. The trusts in this case were created in 1930, four years after the enactment of the applicable provision, so that it must be assumed that the grantor created the trust with full knowledge of the consequences of her act upon her Federal estate tax.

We submit that it cannot be said that Congress has done a wholly arbitrary thing in requiring the inclusion in the gross estate of the full value of the corpus of the trust, even when the power of

revocation had to be exercised by the grantor in conjunction with one having a life interest. The question of due process must be viewed broadly (*Burnet* v. *Wells, supra*), and we think that the line has not been crossed in this case.

CONCLUSION

The court below erred in reading a qualification into the clear and unambiguous provisions of Section 302 (d). The questions of the construction of this provision, as applied to cases in which the grantor must exercise the power of revocation in conjunction with a beneficiary, and the validity of the statute when so construed, have arisen in a number of cases, and will arise under all of the Revenue Acts since the enactment of the Revenue Act of 1924. We respectfully submit that this petition should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 10

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE under an agreement with Gertrude Feldman James, deceased

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–15) is reported in 29 B. T. A. 1141. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 22–29) is reported in 74 F. (2d) 242.

JURISDICTION

The judgment of the Circuit Court of Appeals affirming the Board of Tax Appeals was entered

December 24, 1934. (R. 29.) Petition for writ of certiorari was filed March 23, 1935, and was granted April 29, 1935. (R. 30.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of the corpus of a trust created by the decedent in 1930, where the grantor in conjunction with her husband, who had a contingent interest therein, and the trustee, had the power to revoke or modify the trust.

2. If so construed, whether Section 302 (d) violates the Fifth Amendment to the Constitution.

3. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of certain contingent remainder interests in a trust created by the decedent in 1930, where the grantor, in conjunction with her husband and the trustee, had the power to revoke or modify the trust.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 70:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *.

STATEMENT

The essential facts as stipulated and found by the Board are as follows:

The decedent, Gertrude Feldman James, died May 20, 1931, a nonresident of the United States. (R. 13.)

On February 21, 1930, she transferred certain securities to the City Bank Farmers Trust Company in trust for certain purposes during the lives of her two daughters, or the survivor of them. (R. 13.)

The income of the trust was to be paid to her until her death or until the termination of the trust, whichever should first occur. (R. 13.)

In the event that she died prior to the termination of the trust, the income was to be paid to the grantor's husband, Samuel James, so long as he lived or until the termination of the trust. If he died prior to the termination of the trust, the principal was to be divided into as many shares as there were children of the grantor and Samuel James then living, plus one share for the descendants then living of a deceased child. The income

of each share was to be applied to the use of such child during his life or until the termination of the trust period, whichever should first occur, and, upon his death prior to the termination of the trust, the principal was to be paid to his descendants in such proportions as he had appointed by will, and any part not so appointed was to be paid to his descendants, if living, in equal parts *per stirpes*. If no descendants of such child were living at that time, the principal was to be paid in equal parts *per stirpes* to the surviving children of the settlor and Samuel James and the descendants of a deceased child, or if none were living, to such persons as should then constitute the heirs at law of Samuel James according to the laws of New York then governing the descent of real estate. (R. 13.) In the case of the child who had predeceased the settlor, the principal of the share set apart for her descendants was to be paid over to such descendants in equal parts *per stirpes*. (R. 13.)

Upon the termination of the trust period, the principal was to be paid to Samuel James, if then living; and, if not, to the settlor, if then living; or, if not, to such beneficiaries as were then receiving the income as above outlined and in the same proportions; or, if no such beneficiaries were then living, to the heirs of Samuel James according to the laws of New York governing the descent of real estate. (R. 13–14.)

The trustee was given authority from time to time to apply to the use of the grantor's husband

and descendants so much of the principal as it deemed advisable for their proper "education, care, comfort, support, or advancement in life." (R. 5, 14.)

Paragraph 12 of the trust agreement provided as follows (R. 14):

> The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided, however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James, during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the Trustee shall not be substantially increased without its written consent.

Samuel James, the husband of the settlor, survived his wife, whose death occurred prior to the termination of the trust, and the provisions of the trust instrument became effective as therein provided upon the happening of that contingency. (R. 11.)

The Commissioner determined a deficiency in estate tax of $11,840.03, based upon his inclusion of the value of the corpus of the trust estate in the decedent's gross estate, under Section 302 (d) of the Revenue Act of 1926. (R. 9, 14.)

The Board reversed the action of the Commissioner, holding that Section 302 (d) did not apply. (R. 15.) The Circuit Court of Appeals, one Judge dissenting in part, affirmed the decision of the Board. (R. 29.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing and refusing to find that the enjoyment of said securities was subject to change at the date of the decedent's death, through the exercise of the power, "either by the decedent alone or in conjunction with any person, to alter, amend, or revoke", within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. In failing and refusing to find that the value of certain contingent remainder interests in the trust created by the decedent in 1930 should be included in the gross estate of the decedent, where the grantor, in conjunction with her husband and

the trustee, had the power to revoke or modify the trust.

3. In affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

Section 302 (d) of the Revenue Act of 1926, *supra,* requires that there shall be included in the decedent's gross estate the value of any property of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of decedent's death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke the trust.

The statute is clear and unambiguous, and contains no qualification as to the "person" who shares the power of revocation or amendment with the decedent. A beneficiary constitutes "any person" within the requirement of Section 302 (d), *supra,* and there is nothing in the statute itself, or in its legislative history, to warrant a construction that the words "any person" are to be restricted so as to mean "any person not a beneficiary."

The statute when so construed is not unconstitutional. This Court has sustained the validity of Section 302 (d) as applied to a case where the grantor alone could modify the trust, but could not revest title in himself. The justification of the tax, therefore, lies in the grantor's power to shift the enjoyment of the property among others, which power is terminated by death.

Section 302 (d) of the Revenue Act of 1926, *supra*, was designed to reach what Congress deemed a substitute for testamentary dispositions. The facts of the instant case justify the assumption that the disposition here was, in fact, a substitute for a testamentary disposition and, hence, the statute is valid, even though literally construed.

ARGUMENT

I

THE PROVISIONS OF SECTION 302 (D) OF THE REVENUE ACT OF 1926 REQUIRE THE INCLUSION OF THE VALUE OF THE CORPUS OF THE TRUST IN THE DECEDENT'S GROSS ESTATE

Section 302 (d) of the Revenue Act of 1926, *supra*, provides that there shall be included in the decedent's gross estate the value of any property—

> of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *.

In this case, the decedent in conjunction with the trustee and decedent's husband had the power to revoke or amend the trust. Therefore, the trust comes within the precise language of the statute which requires merely that the power of revocation or amendment be in the decedent alone or "in conjunction with any person."

The statute is broad and clear. It is not limited to cases where the decedent has power to revest title in himself. *Porter* v. *Commissioner*, 288 U. S. 436; *White* v. *Poor*, 75 F. (2d) 35 (C. C. A. 1st). Nor does it require that the grantor alone must be able to exercise the power of revocation or amendment, or even that he with one having no adverse interest must be able to exercise the power. The statute requires merely that the grantor in conjunction with *any person* retain the power to alter, amend or revoke. There is no qualification contained in the statute, and its application should not be restricted, by construction, to cases where the person with whom the decedent shares the power is someone other than a beneficiary. It is well settled that when the language of a statute is clear and unambiguous, there is no room for interpretation. *Cherokee Tobacco* v. *United States*, 11 Wall. 616; *Yerke* v. *United States*, 173 U. S. 439; *Ruggles* v. *Illinois*, 108 U. S. 526, 534; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Thompson* v. *United States*, 246 U. S. 547, 551; *Reinecke* v. *Smith*, 289 U. S. 172, 174.

The court below construed the statute as if it read "in conjunction with any person *not a beneficiary of the trust.*" This construction was also given to the statute by the courts in *White* v. *Poor*, *supra;* and *Helvering* v. *Helmholz;* 75 F. (2d) 245 (App. D. C.), both of which cases are now before this Court on writs of certiorari. We submit that such a construction superimposes on the language

of the statute a qualification not therein contained, and, in effect, amends the statute under the pretense of construing it. *Heiner* v. *Donnan*, 285 U. S. 312, 331. This Court, in *United States* v. *Goldenberg*, 168 U. S. 95, said (p. 102):

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

Cf. *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327.

The respondent may cite the case of *Burnet* v. *Guggenheim*, 288 U. S. 280, as an instance where a court read into a statute words not therein contained. However, the statute in question in that case was not clear and required construction, and the Court adopted what it conceived to be a reason-

able construction of a doubtful statute. *Burnet* v. *Guggenheim, supra,* involved the construction of provisions of the Revenue Act of 1924, imposing a gift tax upon the "transfer * * * by gift during such calendar year of any property wherever situated, whether made directly or indirectly." The words "transfer by gift" were subject to interpretation to ascertain when the transfer by gift should be deemed to have been made in the case of a revocable trust. The Treasury Department construed the statute to mean that where the creator of a trust retained the power to revest title to the corpus of the trust in himself, a taxable transfer by gift should be treated as taking place in the calendar year in which the power was terminated, rather than in the calendar year in which the trust was created. The Court sustained the regulation.

The words "any person" in the statute here involved require no interpretation, and *Burnet* v. *Guggenheim, supra,* is not authority for restricting the plain language of the statute.

In *Commissioner* v. *Strauss,* 77 F. (2d) 401, the Circuit Court of Appeals for the Seventh Circuit, finding no obscurity of language, no uncertainty of meaning, and no inconsistent provisions in the Revenue Act, gave to Section 302 (d), *supra,* a literal construction, and refused to construe it as it was construed by the court below in the instant case and by *White* v. *Poor, supra,* and *Helvering* v. *Helmholz, supra.*

The legislative history of Section 302 (d) supports our contentions herein. The Report of the Ways and Means Committee contains the following (H. Rep. No. 179, 68th Cong., 1st Sess., p. 28):

> By this subdivision if the decedent had the power at the time of his death to change the enjoyment of a property interest, which he had transferred, or with respect to which he had created a trust, such interest is to be included for estate-tax purposes in his gross estate. Likewise, if the decedent had relinquished such a power in contemplation of death, except by a sale for a fair consideration, the property interest over which he had such a power is to be included in his gross estate.
>
> Even though the decedent has made the transfers specified in this subdivision, he has retained substantial control over the disposition of the property, through the power to change the enjoyment thereof. Such property interests should therefore fairly be taxed as part of the decedent's estate, particularly since, by virtue of his death, the substantial interest which he had has been wiped out, and to the same extent the property interest of the legal title holder, his transferee, has been increased. This provision is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust.[1]

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[1] Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219 (g): "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction

There was, as Congress recognized, a somewhat similar purpose reflected in Section 219 (g), relating to income tax, and Section 302 (d), relating to estate tax. But the two provisions are not identical; they differ in two respects. Section 219 (g) of the Revenue Acts of 1924 and 1926 [2] requires that, in order to tax the income of a trust to the grantor, he must exercise whatever power he has in conjunction with any person *not a beneficiary;* they also require that his power must consist of the *right to revest title in himself.* These differences the dissenting opinion in this case pointed to as an indication that Congress meant in each section exactly what it said. (R. 27.) If, in enacting Section 302 (d), Congress did not mean to require that the grantor should have the power to revest title in himself (*Porter* v. *Commissioner, supra*) and had a contrary intention in Section 219 (g), it is reasonable to conclude that Congress did not mean to restrict the application of Section 302 (d) to cases where the power to revoke or amend must be exercised in conjunction with someone not a beneficiary

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with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." (U. S. C., Title 26, Section 960.) This section is identical with Section 219 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Section 960).

[2] Identical with the same section of the 1924 Act—See footnote [1].

of the trust, although Section 219 (g) was so restricted.

There is justification for this distinction. The theory of the imposition of the income tax in such cases is that the grantor must have the power to enjoy the income, so there is a reason for providing that the power shall be exercised by him and someone not a beneficiary. See *Reinecke* v. *Smith*, 289 U. S. 172. The same reason does not exist as to the estate tax. It is not like the income tax dependent upon present ownership or something "fairly to be dealt with as equivalent to ownership" (*Burnet* v. *Wells*, 289 U. S. 670, 679; *Poe* v. *Seaborn*, 282 U. S. 101, 116), but is imposed upon gifts in contemplation of death and other dispositions which may reasonably be classified as testamentary in character or as substitutes for testamentary dispositions.

Congress, after the original enactment of Section 219 (g) of the Revenue Act of 1924, which taxes the income of a revocable trust, has subsequently placed restrictions in that section upon the power reserved (Section 166, 1932 Act; Section 166, 1934 Act), but, on the other hand, has maintained Section 302 (d) substantially as originally enacted in 1924.

In the case of *Witherbee* v. *Commissioner*, 70 F. (2d) 696 (C. C. A. 2d), certiorari denied, 293 U. S. 582, it was argued that Section 302 (d) did not require the inclusion of the value of certain trusts in the gross estate of a decedent, where he could only exercise the power of amendment or revocation in conjunction with a *trustee*, for the reason that the

trustee's interest was adverse to that of the grantor. The Court rejected the argument, holding that the statute clearly applied and that the only question was its validity which it sustained as applied to the facts in that case. Hence the necessity for the trustee's consent is immaterial here.

The court below, in deciding the instant case, as also the Court in *White* v. *Poor, supra,* and *Helvering* v. *Helmholz, supra,* regarded the decision of this Court in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, as controlling here. That case arose under the Revenue Act of 1921, which did not contain the provision, or any provision similar to, 302 (d) of the 1924 and 1926 Acts; and the Court passed only upon the applicability of a provision relating to transfers intended to take effect in possession or enjoyment at or after death, similar to Section 302 (c) of the Revenue Act of 1926.[3] As pointed out in *Milliken* v. *United States,* 283 U. S. 15, the only relevant question in the *Northern Trust Co.* case was, as to the transfers there involved (p. 20):

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[3] Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

> * * * whether some of them were of the class intended by Congress to be taxable under § 402 (c) as transfers "intended to take effect in possession or enjoyment at or after death." * * *

Clearly the decision of this Court in *Reinecke* v. *Northern Trust Co., supra,* is not controlling here. The Court was not there construing any provision analogous to Section 302 (d), and did not pass on the question here presented. In *Porter* v. *Commissioner, supra,* this Court, in construing and applying Section 302 (d), *supra,* for the first time, distinguished the *Northern Trust Co.* case and held it "not in point."

In *Dort* v. *Helvering,* 69 F. (2d) 836, certiorari denied, 293 U. S. 569, the trust instrument reserved to the settlor a power to make any change in the beneficial interests with the consent of the trustee, and, in view of this reserved power, the court held the corpus to be part of the decedent's gross estate, pursuant to Section 302 (d) of the Act of 1924, which is identical with Section 302 (d) of the Revenue Act of 1926. Referring to *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, the court stated as follows:

> * * * we do not think the holding in the *Reinecke* Case in point in this, for there, first of all, the Supreme Court was dealing with another and wholly different section of the Revenue Statute (Revenue Act of 1921, § 402 (c), 42 Stat. 278), and, secondly, be-

cause the language of the trusts there and here is not the same. Subdivision (d), with which we are here concerned, is more far-reaching than the provisions of the 1921 act, and there is a marked distinction between the property to be included for death tax under its provisions and under the provisions of the former act. * * *

II

THE PROVISIONS OF SECTION 302 (D) OF THE REVENUE ACT OF 1926 WHEN SO CONSTRUED AS TO REQUIRE THE INCLUSION OF THE VALUE OF THE CORPUS OF THE TRUST IN THE DECEDENT'S GROSS ESTATE ARE NOT UNCONSTITUTIONAL

Section 302 (d) was designed to prevent estate tax evasion and was intended to reach what Congress deemed a substitute for testamentary dispositions. House Report No. 179, 68th Congress, 1st Session, p. 28, *supra,* shows that it was the aim and intent of Congress to place a tax on property over which the decedent, even though he had made a transfer prior to death, "retained substantial control over the disposition of the property."

It is true that here the decedent's power to revoke or amend the trust was restricted, since it had to be exercised in conjunction with the trustee and her husband, who had an interest in the income contingent upon his surviving the decedent, and an interest in the corpus contingent upon his being alive at the termination of the trust. However, it is not to be assumed that the husband would oppose

every change that the decedent might desire to make, simply because of his contingent interest in the trust. The fact that the decedent chose her husband as a person to share with her the power suggests that she was of no such belief. In trusts where the grantor makes provision for members of his family and places the power of revocation or amendment in himself and one or more members of the family who are beneficiaries, it is obvious that this power is not created with the thought that it will not be exercised. In the instant case, the relationship between the decedent and her husband would warrant her belief that by sharing the power with him she was not relinquishing her control over the trust estate. The solidarity of the family is a circumstance of considerable importance, and cannot be ignored in a case of this type, since the taxing statutes look through the form to the substance of a transaction. *Weiss* v. *Stearn,* 265 U. S. 242; *Eisner* v. *Macomber,* 252 U. S. 189, 211.

Certainly, it cannot be assumed that the husband would oppose any alteration or amendment which would inure to his benefit, and, to that extent at least, his beneficial interest was not adverse. That, alone, should justify inclusion of the trust property in the decedent's estate, for thereby she maintained a substantial control over the trust estate.

We submit that Congress may not be said to have acted arbitrarily or capriciously in assuming that such a grantor has really retained the substantial control over the trust estate, which justifies the tax.

The purpose behind the creation of such a trust as is here involved clearly warrants the assumption. Were it not for the statute, the grantor in such case, while retaining control over the trust estate until death, could prevent the assessment of estate taxes on trust estate by the simple expedient of giving to a member of his family a small interest in the trust and sharing with him the power to revoke or amend the trust.

In *Porter* v. *Commissioner, supra,* the Supreme Court held that the corpus of a trust should be included in the gross estate under Section 302 (d) when the grantor had the power to revoke the trust but could make no change for his own benefit. See also *Cook* v. *Commissioner,* 66 F. (2d) 995, certiorari denied, 291 U. S. 660, and *Dort* v. *Helvering, supra.* If the corpus of a trust may be reached where the grantor has no power to recapture it for his own use, it seems that the justification of the tax lies in his power to shift the enjoyment of the property among others, which power is terminated at his death. Even in the case where he has the power in conjunction with one *not* having an adverse interest, it cannot be said, as a matter of law, that the person exercising the power with him will necessarily agree to any changes that he will desire to make. (See *Witherbee* v. *Commissioner, supra.*) Hence, it is the possibility of a change, rather than the certainty of a change, that must form the basis of the application of the tax. If that is true, there seems to be no reason for holding that the tax can-

not be imposed where the power of revocation must be exercised in conjunction with one having an adverse interest. It cannot be said that such a person will oppose any change made by the grantor, so that the possibility of change, while remote, is not lacking.

There was a possibility of a change of beneficiary in the instant case, just as there was in *Porter* v. *Commissioner, supra,* and the ceasing of this possibility upon the decedent's death might reasonably be deemed a substitute for a testamentary disposition. We submit that since the transfer here was subject to change until the decedent's death and was not complete until death had occurred, the transfer was a substitute for a testamentary disposition which Congress had power to tax in order to make the taxation of estates complete and consistent and in order to prevent the easy evasion of taxes.

In *Porter* v. *Commissioner, supra,* it was argued that the provision violated the due-process clause of the Fifth Amendment, in that it taxed gifts *inter vivos* that were fully consummated prior to the enactment of the provision and would be confiscatory under *Nichols* v. *Coolidge,* 274 U. S. 531, and *Heiner* v. *Donnan, supra.* The Court said (pp. 444–445):

> But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of

> other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in Sec. 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells,* 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do. *Reinecke* v. *Northern Trust Co., supra. Chase National Bank* v. *United States, supra. Tyler* v. *United States, supra,* 502. *Klein* v. *United States,* 283 U. S. 231. *Gwinn* v. *Commissioner,* 287 U. S. 224.

Cf. *Witherbee* v. *Commissioner, supra.*

This Court, in *Burnet* v. *Wells,* 289 U. S. 670, upheld the validity of a tax imposed upon the grantor of a trust, with respect to income from the trust used to pay premiums on insurance on the grantor's life, though he had no power to revoke the trust or demand that the income be devoted to any other purpose. This Court said (pp. 677–679):

> The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process

always are, not narrowly or pedantically, in slavery to forms or phrases. "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers*, *supra*, p. 378. Cf. *Burnet* v. *Guggenheim*, *supra*, p. 283. Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common-law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits. *Milliken* v. *United States*, 283 U. S. 15, 24, 25; *Reinecke* v. *Smith*, *supra*. Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place. *Corliss* v. *Bowers*, *supra*; *Reinecke* v. *Smith*, *supra*. Government in

> casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership, but any right or privilege that is a constituent of ownership. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 268; *Bromley* v. *McCaughn,* 280 U. S. 124, 136. Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis. A margin must be allowed for the play of legislative judgment. To overcome this statute the taxpayer must show that in attributing to him the ownership of the income of the trusts, or something fairly to be dealt with as equivalent to ownership, the lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit. *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192, 204; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Milliken* v. *United States, supra.* The statute, as we view it, is not subject to that reproach.

The Court in *Burnet* v. *Wells, supra,* was speaking of an income tax, in which form of taxation greater emphasis is given to "refinements of title" than in the field of estate taxes. Yet in that case the Court recognized that the possibility of evasion of taxes through the creation of inheritance trusts

in which the "solidarity of the family" was a factor, justified allowing a margin for the play of legislative judgment.

The principles which were applied by the Court in *Burnet* v. *Wells, supra,* justify the tax here. As the Court has pointed out in *Burnet* v. *Guggenheim, supra,* there has been a constant broadening of the concept of what constitutes a substitute for a testamentary disposition of property in deciding what are the limits of Congressional power in imposing an estate tax. See *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Tyler* v. *United States,* 281 U. S. 497; *Gwinn* v. *Commissioner,* 287 U. S. 224; *Third Nat. Bank & Trust Co.* v. *White,* 287 U. S. 577; *Milliken* v. *United States,* 283 U. S. 15; *United States* v. *Wells,* 283 U. S. 102.

It is well settled that except in rare instances the Fifth Amendment is not a limitation upon the taxing power of Congress. *Brushaber* v. *Union Pac. R. Co.,* 240 U. S. 1, 24; *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Heiner* v. *Donnan,* 285 U. S. 312, 325. We think it is also settled that an exercise of the taxing power by Congress would be sustained by the courts unless it clearly appears that the method devised by Congress is arbitrary and capricious. In *Magnano Co.* v. *Hamilton,* 292 U. S. 40, where the taxpayer sought to invoke the due proc-

ess clause of the Fourteenth Amendment to bar the collection of a state tax levied on oleomargarine, the Court said (p. 44):

> That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.

The sole question in deciding the validity of each new provision is whether Congress has acted arbitrarily or capriciously.

We submit that to characterize the creation of such a trust as is involved here as a substitute for a testamentary disposition, is not capricious or arbitrary, but reasonable. Nor can it be said that Congress has done a wholly arbitrary thing in requiring the inclusion in a decedent's gross estate of the full value of the corpus of a trust, even when the power of revocation or amendment of the trust is to be exercised by the grantor in conjunction with one having a beneficial interest. The question of due process must be viewed broadly (*Burnet* v. *Wells, supra*), and we think that the line has not been crossed in this case.

III

THE COURT BELOW SHOULD HAVE INCLUDED IN THE DECEDENT'S GROSS ESTATE THE VALUE OF THE REMAINDER INTERESTS OF THE DECEDENT'S CHILDREN IN THE TRUST ESTATE

The majority of the court below held that the value of the entire trust was to be excluded from the gross estate of the decedent. In *Lit* v. *Commissioner*, 72 F. (2d) 551, the Circuit Court of Appeals for the Third Circuit held that the wife's life estate could not be taxed, since she had to consent to revocation and her interest was adverse, but held the son's remainder interest to be taxable. The dissenting opinion in this case is in accord with the *Lit* decision, in holding that the corpus of the trust, less the value of the husband's interest, should be included in the decedent's gross estate.

We submit that even if the value, whatever it may be, of the husband's interest could not be constitutionally included in the decedent's gross estate, no such objection applies to the remainder interests, i. e., the value of the decedent's children's interests. As to these interests, the doctrine of *Reinecke* v. *Northern Trust Co., supra,* clearly would not apply, since the consent of none of the children was necessary to an amendment or revocation of the trust, and as to their interests the life estate of the husband was not an adverse interest. Accordingly, even if this Court should be of the opinion that the

adverse interests of the husband precludes the inclusion of his life estate in the decedent's gross estate, the decision below should be reversed and the case remanded to determine from the record, if possible, the value of the remainder interests of decedent's children and to require the inclusion of the value of such interests in the decedent's gross estate.

The lower court, however, held that the remainder interests of decedent's children were not taxable, stating that—

> * * * in view of the permissible use of the entire corpus for the "care, comfort, support or advancement in life" of her [settlor's] husband and the right to use any or all of it at any time during his lifetime, it may well be that the daughters would never become entitled to any of the corpus of the trust.

The effect given by the lower court to this provision is erroneous. The provision does not preclude the applicability of the *Lit* decision, stated hereinabove. Such part, if any, of the corpus which, at the settlor's death, would be found necessary for the support of the husband, would be definitely ascertainable (*Ithaca Trust Co.* v. *United States*, 279 U. S. 151), and would merely be one further item in connection with valuing the husband's interest. But so much of the corpus in excess thereof remains taxable.

CONCLUSION

We submit that the decision of the court below is erroneous and should be reversed. In any event, as to the remainder interests of the decedent's children, the interests of the decedent's husband was not adverse, and such remainder interests should have been included in the decedent's gross estate; hence, the decision below should be reversed and remanded for such inclusion.

Respectfully submitted.

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SEPTEMBER, 1935.

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CHARLES E. ...

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. [redacted] 10

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

against

CITY BANK FARMERS TRUST COMPANY as Trustee under an agreement with Gertrude Feldman James, Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM ON BEHALF OF RESPONDENT.

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Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 805

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

against

CITY BANK FARMERS TRUST COMPANY as Trustee under an agreement with Gertrude Feldman James, Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM ON BEHALF OF RESPONDENT.

The undersigned had prepared a brief in opposition to the granting of the writ prayed for by the Commissioner herein, contending (1) that there was no general principle of law involved in this case not already in effect passed upon by this Court; and (2) that there was no conflict in the decision below with any decision of this Court; and (3) that there was no actual conflict with the decision of any other Circuit Court of Appeals; and (4) that the statute was not susceptible of any construction other than that given it by the court below without raising serious constitutional questions as to the validity of the statute.

Since the completion of the brief, however, there has been published a decision of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Strauss, et al., Executors,* rendered March 30, 1935 (unofficially reported in Commerce Clearing House Standard Federal Tax Service, Vol. 3, 1935, Par. 9756 at p. 9751 —report April 3, 1935) which is in obvious conflict with the decision below, and with the decisions in *Lit* v. *Commissioner* (72 F. (2) 551—C. C. A. 3), *White* v. *Poor* (C. C. A. 1, 75 F. (2) 35), and *Helvering* v. *Helmholz,* Court of Appeals of the District of Columbia (75 F. (2) 245).

In lieu of the brief prepared by the undersigned we respectfully submit this memorandum drawing to the attention of this Court the said decision of the Circuit Court of Appeals for the Seventh Circuit. Notwithstanding we believe the decision of that Court to be an incorrect interpretation of the law, and believe the interpretation given to the statute by that Court renders the statute unconstitutional as a violation of the due process of law clause of the Fifth Amendment; and notwithstanding we believe that decision in conflict with the decisions of this Court, and particularly with the decision in *Reinecke* v. *Northern Trust Co.* (278 U. S. 339), and in conflict with the clear implications of *Porter* v. *Commissioner* (288 U. S. 436, 443, 444) and *Reinecke* v. *Smith* (289 U. S. 172, 176, 177), the conflict between circuits, thus disclosed, may require this Court to issue certiorari.

Respectfully submitted,

April 6, 1935.

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 10

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

CITY BANK FARMERS TRUST COMPANY, as Trustee under an agreement with Gertrude Feldman James, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1935.

No. 10.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

CITY BANK FARMERS TRUST COMPANY, as Trustee under an agreement with Gertrude Feldman James, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

The Question Presented.

The issue is (1) whether Section 302(d) of the Revenue Act of 1926 may be construed so as to apply to an *inter vivos* trust unalterable and irrevocable, except with the consent of a beneficiary and consequently an interest adverse to such alteration or revocation; and (2) whether, if it may be so construed, it is not unconstitutional as in violation of the due process of law clause of the Fifth Amendment of the Federal Constitution.

The Statute Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9, 70:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value

at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *.

Statement.

Gertrude Feldman James, a non-resident of the United States, died May 20, 1931 (R. 13). On February 21, 1930, she created a trust with the City Bank Farmers Trust Company of New York, as trustee (R. 13). Every security in the trust was a foreign security (R. 20-22). The trust was to continue during the lives of her two daughters or the survivor (R. 13). The income of the trust was to be paid to her during her life or until the termination of the trust (R. 13). After her death, her husband, Samuel James, surviving, the income was to be paid to him. If he were dead, or upon his death, the income was to be paid to the two children, or the descendants, if any, of such child as might be then dead (R. 4).

Upon the termination of the trust the principal was to be paid to Samuel James (the husband) if he were then alive (whether or not the Settlor was still living) and if he were then dead, to the Settlor if she were alive, if not, then to the descendants of the two children, and if none, then to heirs at law of Samuel James (R. 5).

The trust was unalterable and irrevocable except with the written consent of the trustee and Samuel James during his life, and after his death except with the written consent of the trustee and Samuel James' brother (R. 7). Samuel James, the husband, survived, and is now receiving the income of the trust (R. 15).

The trust indenture also provided (R. 5) that during the trust term the trustee could from time to time in its discretion apply to the use of the husband and his descendants so much of the principal of the trust as it deemed advisable for their proper education, care, comfort, support, or advancement in life.

Summary of Argument.

A transfer or trust subject to no revocation or alteration except with the consent of a "beneficial, and consequently adverse, interest" is complete when made (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 346, and cf. *Reinecke* v. *Smith*, 289 U. S. 172, at p. 176).

A power exercisable only upon or with the consent of one adverse to such exercise is in effect "for all practical purposes" no power at all. If no power in the Settlor existed at her death by which she could in any reasonable, practical sense, revoke or change the beneficial interests already fixed and determined, the statute could not and was not intended to have application.

"Taxation is an intensely practical matter" (*Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 212), and laws in respect of it should be construed and applied in a practical, reasonable way. "Taxes are very real things and statutes imposing them are estimated by practical results" (*Nichols* v. *Coolidge*, 274 U. S. 531, 541). The statute in suit should be construed reasonably, and practically, in the light of the fundamental law.

In view of the decision of this Court in *Reinecke* v. *Northern Trust Co.*, *supra*, and the re-announcement in *Porter* v. *Commissioner* (288 U. S. 436), and *Reinecke* v. *Smith* (289 U. S. 172) of the doctrine there laid down, serious constitutional questions are presented if the statute may be construed so as to apply to an *inter vivos* transfer, not made in contemplation of death, and irrevocable except with the consent of a beneficial or adverse interest.

"Even to avoid a serious doubt" (*Blodgett* v. *Holden*, 275 U. S. 142, 148) that construction should be given that will save the Act (*Lewellyn* v. *Frick*, 268 U. S. 238, 251; *Panama R.R. Co.* v. *Johnson*, 264 U. S. 375, 390; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, 402).

But if the statute is susceptible of no construction other than that contended for by the Commissioner of Internal Revenue, then the statute, it is submitted, as applied to the facts in suit, is arbitrary and capricious, and in violation of the due process of law clause of the Fifth Amendment of the Federal Constitution.

ARGUMENT.

POINT I.

Section 302(d) does not and was not intended to apply to transfers or trusts revocable only with the consent of one having a beneficial and consequently adverse interest.

The statute (Sec. 302(d) Rev. Act of 1926) provides for the inclusion in the gross estate of a decedent of any property transferred or trust created "where the enjoyment thereof was subject *at the date of his death* to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *". (Italics ours.) It is clear that the statute must be reasonably construed in the light of the fundamental law. This Court has held that a so-called power so conditioned and bridled did not bring the transfer within the taxing statute there involved (*Reinecke* v. *Northern Trust Co.*, supra; *McCormick* v. *Burnet*, 283 U. S. 784, and *cf. Porter* v. *Commissioner*, supra, pp. 443, 444, and *Reinecke* v. *Smith*, supra, 176, 177). It was in accordance with the opinions in these cases that the Circuit Court of Appeals below consonantly decided the case in suit. The fundamental and thoroughgoing nature of the doctrine laid down in the

above referred to cases is too inherent in the scheme of the law itself to be confined only to the section of the law passed upon in *Reinecke* v. *Northern Trust Co.*, supra.

It is fundamental that a completed *inter vivos* transfer, not made in contemplation of death, may not be subject to the Federal estate tax as a part of the gross estate of the decedent (*Heiner* v. *Donnan*, 285 U. S. 312; *May* v. *Heiner*, 281 U. S. 238). A transfer the *control of the disposition of which* is retained by the transferror to the time of death is properly the subject of tax, whether the control of that disposition be one beneficial to the settlor (as in *Reinecke* v. *Northern Trust Co.*, supra,—two trusts), or non-beneficial to himself or his estate (as in *Porter* v. *Commissioner*, supra). An estate by the entirety or a joint tenancy is amenable to the taxing law (*Tyler* v. *United States*, 281 U. S. 497). There, a property right obtaining in the decedent at the moment of death does indeed, this Court held, accrue to the survivor—and death thus was the occasion of the shifting of economic benefits from one of the entirety to the survivor—moving by reason of death from the dead to the living, which is the incidence of the tax. Gifts made in contemplation of death (*Milliken* v. *United States*, 283 U. S. 15), while not made at death, are nevertheless so assimilated to death by reason of the fact that the transfer would not have been made for the coercive motive of contemplated death, that it seemed the property passed from the dead to the living within the purview of the statute.

But here nothing passed from Mrs. James at her death or by reason of her death to anyone else. Her life interest in the income of the trust was merely obliterated by her death (*May* v. *Heiner*, 281 U. S. 238, 243). The transfer concededly was not made in contemplation of death. The only ground upon which it is sought to be taxed is under the provisions of Section 302(d). Indeed, if she had not created the trust there would have been no claim for the tax, because the foreign securities, if with her at her

domicile abroad, were not taxable in the United States. The property rights were fixed and determined by the deed of transfer on February 21, 1930, and were fixed on that date long prior to death. "The tax is a charge upon the creation of the right. It is not a charge upon fruition in enjoyment or possession. We must fix the point of time at which creation was effective". (Cardozo, J., in respect of the New York transfer tax in *Matter of Schmidlapp*, 236 N. Y. 278, at p. 283, and see relatively the same thought expressed by Mr. Justice Roberts in *Reinecke* v. *Smith*, 289 U. S. at p. 176.) Upon Mrs. James' death her husband, pursuant to the terms of the trust instrument, became the life tenant and is now receiving the full income of the trust (R. 15). "We are to view the sequence of events in the order of the actual rather than the possible" (*Matter of Schmidlapp*, at p. 286).

Two cases in this Court, we think, stand as barriers not only to the construction sought by the petitioner, but to the constitutionality of the law if he were successful in having this Court adopt the construction urged by him (*Reinecke* v. *Northern Trust Co.*, *supra*, and *McCormick* v. *Burnet*, 283 U. S. 784).

In *Reinecke* v. *Northern Trust Co.*, which arose under the 1921 Act, and had for consideration Section 402(c) thereof, which taxed transfers intended to take effect in possession or enjoyment at or after death, there were seven trusts created by the decedent during his lifetime. Two were created, respectively, in 1903 and 1910 prior to the enactment of the first Federal Estate Tax law. The other five were all created in 1919 after the enactment of the first Federal Estate Tax law. In each of the first two trusts "there was reserved to the settlor *alone* a power of revocation". (Italics ours.) In each of the remaining five trusts the settlor reserved a power "to alter, change or modify the trust", which power was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one

of the trusts by the settlor and a majority of the beneficiaries named, acting jointly.

Four of these five trusts were for the benefit, respectively, of the four children of the settlor, and each could be altered or modified only with the consent of the beneficiary of such trust. The fifth was for the life benefit of the wife with remainders over to the four children.* That trust could be altered or modified with the consent of a majority of such five beneficiaries. In other words, three of them, the other two unwilling notwithstanding, could join with the settlor in altering, changing or modifying the trusts created, to the exclusion of the rights or interests of the other two.

This Court held the two trusts of 1903 and 1910 subject to the tax. This, upon the ground that the settlor, until his death, had complete *dominion* and *control over the disposition* of the property to the date of his death, and therefore the transfer was not complete until death. (See and cf. *Burnet* v. *Guggenheim*, 288 U. S. 280.) In the five trusts, however, this Court held the transfers were complete when made (pp. 346-7), and thus not within the taxing ambit. This, we submit, because the basis of the tax, that is, the incidence, is upon the transfer of property, the shifting of economic interests and benefits, from the dead to the living by reason of death, and as the trusts were complete when made nothing remained that passed from the dead to the living at death.

The doctrine there laid down by this Court sinks deep into the roots of the law governing the whole tax scheme. At p. 346, through Mr. Justice Stone, this Court said:

> "He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, *and in the case of one trust without the consent of a majority of those* so entitled. *Since the power to revoke or alter* was dependent on the con-

* See Transcript of Record.

> sent of the one entitled to the beneficial, and consequently adverse, interest, *the trust, for all practical purposes, had passed as completely from any control by decedent* which might inure to his own benefit *as if the gift had been absolute.*" (Italics ours.)

And again, at pp. 346-347, the opinion continues:

> "The shifting of the economic interest in the trust property which was the subject of the tax *was thus complete as soon as the trust was made.* His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them *from any other gift inter vivos not subject to the tax.*" (Italics ours.)

In *McCormick* v. *Burnet* (283 U. S. 784, reversing 43 F. [2d] 277), the settlor created in 1918 a trust, the income to be accumulated and added to principal, except under certain circumstances not here material, during the life of the settlor. Upon her death the income was to be distributed equally among her three children. The settlor reserved the power to terminate the trust in whole or in part at any time by the delivery to the trustee of an instrument signed by her "and by one or more of her three children hereinbefore named". Upon termination of the trust during the settlor's life the principal was to be turned over to her.

This Court held the transfer in trust by Mrs. McCormick not subject to the Federal estate tax under the provisions of Section 402(c) of the Revenue Act of 1921.

The holding and the language in *Reinecke* v. *Northern Trust Company* are too direct, and the principle there laid down too fundamental, to be brushed aside as applying only to the case there decided or the section of the statute there considered, and this seems clear from subsequent decisions of this Court in which that doctrine has been again and again re-announced. That the principle announced in *Reinecke* v. *Northern Trust Company*, and re-applied in *Mc-*

Cormick v. *Burnet* still obtains, and is inherent in the tax scheme itself, is indicated by a decision arising under subdivision (d) of Section 302 (the very section here involved), which case takes not one whit from the fundamental force and nature of the doctrine. *Porter* v. *Commissioner* (288 U. S. 436). In that case the Court held an *inter vivos* transfer taxable where the donor had a power of disposition or appointment to new uses at the time of his death, though not for the benefit of either himself or his estate. This Court held that such a transfer, with such a power of disposition or appointment to new uses reserved *exclusively* to the settlor, brought the transaction within the purview of Section 302(d). This Court at that time was careful to point out that the power in the *Porter* case was indeed a power, that is to say a power that "the donor reserved unto himself alone" (p. 444), while indicating that the so-called power in the *Reinecke* case was impotent and ineffective and for that reason the *Reinecke* case was distinguishable from the *Porter* case.

Mr. Justice Butler in pointing out the inapplicability of the *Reinecke* case to the facts and the statute in the *Porter* case, and in repeating the doctrine expressed in the *Reinecke* case, without in any way emasculating its primary force or shading its meaning, said at p. 442:—

> "Two were held taxable because subject to a power of revocation *in him alone. In each of the others* he reserved power to alter, change or modify, to be exercised in four by joint action of himself and a single beneficiary, and in the remaining one by himself and a majority of the beneficiaries acting jointly. As the title *was put beyond his control, we held these transfers not taxable*". (Italics ours).

This Court then proceeded to point out the basic factor that rendered the transfers in the *Porter* case amenable to the statute, while leaving it clear, we submit, that such a transfer as that in *Reinecke* v. *Northern Trust Company* would not have been, and said at p. 444:—

> "They [the petitioners] treat as without significance *the power the donor reserved unto himself alone* and ground all their arguments upon the fact that deceased, prior to such enactment, completely divested himself of title without power of revocation * * *. But the reservation here may not be ignored, for, while subject to the specified limitation, *it made the settlor dominant in respect of other dispositions of both corpus and income.*" (Italics ours).

The settlor in the case in suit had no such control or dominion. She had even less control and dominion than the settlor in either the *Reinecke* v. *Northern Trust Co.* or *McCormick* v. *Burnet* cases. It will be noted that the decision in the *Porter* case is not only consonant with the decision in *Reinecke* v. *Northern Trust Company,* but the same fundamental doctrine like "a common thread of purpose" runs through both. That doctrine is that so long as a transferror, up to the moment of death, has "control of the disposition" of the property, that is to say, the transferror has the "dominant" right in respect of the disposition, whether self-beneficial or not, it is death that occasions the shifting of economic interests, and is consequently the incidence of the tax. If the settlor be not dominant in the power of disposition at death, and have no power except with consent of an interest necessarily adverse to modification, alteration or revocation, then it may not be said, within the sphere of practicality, that the transferror had any power whatever (see and cf. *White* v. *Poor,* 75 F. (2d) 35, 38, C. C. A. 1, No. 36, here). A power exercisable only with the consent of an adverse interest is not a power, clearly not a power of such strength as to support an excise of the character here presented.

This Court, again, in considering another statute (income tax law) after the decision of *Reinecke* v. *Northern Trust Co.,* pointed out the distinction between a power unrestrained wholly or restrained only by one not having an adverse beneficial interest, and a so-called power exercisable

only upon the consent of an adverse beneficial interest. In *Reinecke* v. *Smith* (289 U. S. 172), this Court, through Mr. Justice ROBERTS, said at p. 176, in reference to *Reinecke* v. *Northern Trust Co.*:—

> "The tax was upheld as applied to the corpus of trusts over which the grantor *had sole power* of revocation. *It was, however, condemned as to those where revocation was dependent upon joint action of the grantor and the beneficiary,* for the reason that the interest of the beneficiary was adverse and the grantor *unable at will* to alter or destroy the trust. *In the latter case the transfer was said to be effective when made, not at death.* As pointed out in *Burnet* v. *Guggenheim* (288 U. S. 280) the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income." (Italics ours).

Thus again this Court was insistent to reiterate the principle laid down in *Reinecke* v. *Northern Trust Co.* It further said at p. 177:—

> "A settlor who at every moment retains the power to repossess the corpus and enjoy the income has such a measure of control as justifies the imposition of the tax upon him. *Corliss* v. *Bowers,* supra. We think Congress may *with reason* declare that where one has placed his property in trust subject to the right of revocation in himself and another, *not a beneficiary,* he shall be deemed to be in control of the property." (Italics ours).

It thus will be seen that the Court subsequent to the decision of *Porter* v. *Commissioner,* was careful again to lay down the doctrine of the right of the Congress to tax by reason of the reserved control or dominion over the disposition of the property either alone or in conjunction with someone else, but obviously with equal care and deliberation indicated condemnation of the tax if that supposed control was fettered by the necessity of a beneficiary's consent.

(a) *A power dependent upon the consent of an interest adverse to its exercise is no power, and Congress did not intend the statute to apply in such a case.*

Every *inter vivos* trust is subject to revocation with the consent of all the interested parties. It is clearly so under the New York law (*Garner* v. *Germania Life Ins. Co.*, 110 N. Y. 266), and this trust by its terms was governed by the laws of New York (R. 7). It is even provided by statute in New York (Personal Property Law, Sec. 23) that a trust of personal property may be revoked by all persons in interest living at the time uniting in the act, and this has been held to permit the life beneficiary to terminate such a trust even when there may be possible unborn interested parties (see *Cram* v. *Walker*, 173 App. Div. 804, 806).

Any gift is subject to revocation if the donee thereof consents thereto. Unless a fetish be made of literalism, the word "person" could have its roots only in the understanding that the statute had reference to a transfer incomplete so far as the *control and dominion over the disposition* thereof by the settlor was concerned at the time of his death. (see and cf. *Porter* v. *Commissioner*, 288 U. S. 436, 444). So far as the control of the property and its disposition by the settlor was concerned, the trust in suit stood in no different position from that of a trust in which the provisions of Clause 12 thereof were omitted.

The words "any person" could not in reason, under this kind of tax, apply to a donee or adverse beneficiary; and yet a donee is a person. The meaning must apply to strangers to the property rights or beneficial interests. So construed the word is applied to a trustee (*Witherbee* v. *Commissioner*, 70 F. [2d] 696, certiorari denied 293 U. S. 582). There the circuit court of appeals said at p. 697:—

> "The situation is unlike that in *Reinecke* v. *Trust Co.*, 278 U. S. 339, where the power was subject to the approval of the beneficiaries themselves."

And thus the basic thought remains yet plain. A trustee, it has been held, is not a beneficiary (*Reinecke* v. *Smith*, supra), and does not hold an adverse beneficial interest—whatever his duties otherwise may be. But to apply the words to a donee (or other adverse interest) is to include practically every *inter vivos* trust or gift, and render the statute unreasonable and arbitrary. Trusts irrevocable except with the consent of the beneficial adverse interest are taxable under the gift tax law as completed transfers. (See Art. 3, Reg. 79, Gift Tax.)* If, as this Court has held, they are complete at the time of creation, then they are not incomplete later at death.

The practical result of a revocation with the consent of a donee or other adverse beneficial interest is a gift back by the donee or such beneficial adverse interest, and so the Circuit Court of Appeals for the First Circuit said in *White* v. *Poor* (75 F. [2d] 35), at p. 38:

> "In view of the decision in *Reinecke* v. *Northern Trust Company* we are of the opinion that the decedent before and at the time of her death had no power by which she could effect a change of interest in the trust, and consequently that the corpus of the

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* Art. 3. Transfers in trust.—Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. * * * For the purposes of these regulations a donor shall be considered as having the power to revest in himself title to the property transferred in trust where he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the trust property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. Where the power to revest in the donor title to property transferred in trust reposes in him in conjunction *with any other person having a substantial adverse interest* in the disposition of the property or the income therefrom or where the power is in such other person alone, *the transfer is subject to tax* as though no such power existed. (Italics ours.)

trust was completely transferred to the trustee at the date of the execution of the trust instrument, for whatever power was reserved to her could only be exercised in conjunction with one having a beneficial adverse interest. If A gives property to B, reserving to himself the right to revoke the same only upon B's consent, the transfer is complete, the reservation is nil, and whether A gets the property back or not lies wholly with B. If a transfer back is made with B's consent, it would be a gift back and not a revocation. This is in substance the situation here."

It is beyond question, we submit, that Samuel James had an actual, substantial, interest in the trust fund, the corpus as well as the income therefrom. In addition thereto, he was not only the remainderman upon the termination of the trust during his lifetime, but he had also a right to the corpus for his own care, comfort, support or advancement in life, in the discretion of the trustee, during the term of the trust; and furthermore, upon the failure of the remainders set out in the trust, the property went to *his* heirs at law, not the heirs at law of the settlor. His interests were vested interests (Sec. 40 N. Y. Real Property Law; Sec. 11 Personal Property Law; *Moore* v. *Littel*, 41 N. Y. 66; *Matter of Barstow*, 230 App. Div. 371, aff'd without opinion 256 N. Y. 647).

The settlor had no power of revocation, amendment, or alteration at the time of her death within the purview of the statute. The so-called power expressed in the trust indenture lay impotent and ineffectual in her hands. It was only upon the consent of one holding an adverse interest that she could act. An impotent power is no power. That such a power, so conditioned and so circumscribed, does not affect the completeness of the transfer, is clear from the decision in *Reinecke* v. *Northern Trust Co.*, and the reiteration of the doctrine there laid down in *Porter* v. *Commissioner*, *supra*, and in *Reinecke* v. *Smith*, and is indicated in the treatment of such transfers by the Internal

Revenue Bureau in the administration of the Gift Tax laws; and was in words expressed in the 1932 Act (Sec. 501(c))*.

If there was in any practical, reasonable, sense a power of alteration or disposition in anyone during the life of Mrs. James, that power lay in the hands of her husband, the beneficiary. Not in the Settlor. Her act, will, or power was a nullity. Only by the act of Samuel James, the beneficiary, could the trust be altered, amended or revoked. True, this power was not in him alone. Nevertheless, nothing could be done except it be done in accordance with his wishes and consent; and his interests in both the principal and the income were substantial vested adverse interests.

(b) *The rule that a statute will be construed so as to relieve it of unconstitutionality and even to avoid a serious doubt thereof, is applicable here.*

The petitioner argues that there is no room for construction, that the language of the statute is too plain to leave open to this Court the right to construe. We submit that not only is there room for construction, but that any statute, which if literally and slavishly construed would raise grave doubts of its constitutionality, is the subject of reasonable, practical construction by this Court. We further submit that the construction urged herein by us does not superimpose on the language of the statute a qualification not therein contained. Nor does it, under the pretense of construction, in effect seek to amend the statute.

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* Because of the decision in *Burnet* v. *Guggenheim*, 288 U. S. 280, this section was omitted in the 1934 Act. See Report Ways and Means Committee, 73rd Congress, 2nd Session, H. R. 704, at p. 40, where it is stated:—

> "Sec. 511. Gifts of property subject to power: This section repeals Section 501(c) of the Revenue Act of 1932, since the principle expressed in that section *is now a fundamental part of the law* by virtue of the Supreme Court's decision in the *Guggenheim* case." [Italics ours].

On the contrary, the language, we urge, should be given that construction that is in keeping not only with the tax scheme but with the fundamental law lying at the base of this kind of tax. This is a death tax, not a gift tax.

We submit that the statute should be construed so as to relieve it of any question of constitutionality, or even any doubt upon that score (*Blodgett* v. *Holden*, 275 U. S. 142—concurring opinion of Mr. Justice Holmes, p. 148; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, 402; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, 408).

In *Blodgett* v. *Holden*, supra, it was said at p. 148:

> "* * * The rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*" (Italics ours.) (Concurring opinion Mr. Justice Holmes.)

In *Lewellyn* v. *Frick* (268 U. S. 238), the Court said at p. 251:

> "Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind."

In *Blodgett* v. *Holden* the Revenue Act of 1924 (Sec. 319) had provided for a tax upon all gifts made during the calendar year 1924, although the law was not passed until June 2, 1924. This Court held the tax inapplicable to gifts made before the law was introduced in Congress. Four members placed the decision upon the ground that the fairly plain words of the statute should be construed to mean gifts made during the calendar year 1924 "after the enactment of the law" (p. 148).

The Revenue Act of September 8, 1916 (Sec. 202(b)) had provided that "to the extent of any interest therein of which the decedent *has at any time made a transfer* * * *

in contemplation of death", etc., the transfer was taxable. Yet this Court held that the words "has at any time made a transfer" must be construed to mean "has at any time after the enactment of the act". (*Shwab* v. *Doyle*, 258 U. S. 529; *Union Trust Co.* v. *Wardell*, 258 U. S. 537; *Levy* v. *Wardell*, 258 U. S. 542.)

In *United States* v. *Jin Fuey Moy*, supra, the words "any person not registered" used in the Harrison Narcotic Act were construed not to mean "any person in the United States" as the context apparently indicated, but to mean "any person" in the class required to be registered by Section 1 of the Act (p. 402).

A statute making it a crime to detain or retard the passage of the mail was construed, notwithstanding the apparently plain words, as inapplicable to the case of an arrest of a carrier of mail for murder (*United States* v. *Kirby*, 7 Wall. 482, 486 [74 U. S.]; see also and cf. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457).

Subdivision (g) of Section 302 of the Act in suit (Revenue Act of 1926) provides for the inclusion in the gross estate of proceeds of life insurance policies:—

> "; * * * to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance taken out by the decedent upon his own life".

Notwithstanding the provisions of the statute which plainly states that if the insurance was taken out by the decedent on his own life all over $40,000 is taxable, the Treasury Department in administering the law construes the statute so as to include the proceeds of life insurance policies payable to designated beneficiaries only "if the decedent possessed at the time of his death any of the legal incidents of ownership". (Reg. 80, Art. 27; see also interpretation by Gen. Counsel Dec. 22, 1934, Commerce Clearing House, F. T. S. for 1935, p. 8046; and compare as a reason, no doubt, for this construction, *Chase National Bank* v. *United States*, 278 U. S. 327.)

We must look to the purpose of the act, taking into consideration the fundamental law governing the scheme of the tax. It was intended to catch within the net of the law all transfers made before death the disposition of which was reserved to the control of the settlor to the time of his death. If, on the other hand, that power or control of the disposition of the property be not in the decedent at the time of his death, it is difficult to see how the transfer could in any substantial or real sense be said to be testamentary in character, or the taxation of such trusts be at all necessary to the full and complete operation of the statute (see and cf. *Nichols* v. *Coolidge*, 274 U. S. 531 and *May* v. *Heiner*, 281 U. S. 238, 243).

The Committee Report itself quoted on page 12 of the petitioner's brief re-affirms this purpose. It is, so far as pertinent hereto: "By this subdivision *if the decedent had the power at the time of his death* to change the enjoyment or property interest * * * such interest is to be included for estate tax purposes in his gross estate" (italics ours). Obviously if he has not the power, or that power be so circumscribed and bridled as to make it in effect a nullity, it cannot within reason be said that the statute was intended by the Congress to have application. The statute was after *pseudo* or *quasi* transfers, not completed acts.

But the Committee Report proceeds further and even indicates what it means by the "power at the time of the death," for it says "Even though the decedent has made the transfer specified in this subdivision, *he has retained substantial control over the disposition of the property* through the power to change the enjoyment thereof * * *" (italics ours). It was the purpose of Congress that before a transfer (which was subject to the gift tax under the 1924 Act) could be included as a part of the decedent's gross estate under Section 302(d), there must be a power in the decedent at the time of his death, and that power must be a "substantial" one, that is, a "substantial control over the disposition of the property".

We think it fairly may be said that it is a far cry to say that the settlor in the case in suit had a power to change the enjoyment of the property or that she retained substantial, if, indeed, any, control over the disposition of it.

The decision of this Court in *Porter* v. *Commissioner*, supra, construing this section, is in exact accord with the purposes as indicated in the Report of the Ways and Means Committee above referred to. In that case there was a power, a substantial control, over the disposition of the property to uses other than those beneficial directly to the grantor, nevertheless, the power was there exercisable at the will of the settlor. On the other hand, if no power exist, or it be not a substantial control, that is, a power exercisable at the will of the settlor, not only, we submit, did the Congress not intend such a transfer to be included as a part of the gross estate of the decedent, but, the language in view of the general law underlying the tax scheme, appropriately should not be so construed.

If the statute may not be given the interpretation which has been attributed to it by all the courts that so far have considered the matter, with the exception of the one case of *Commissioner* v. *Strauss*, 77 F. [2d] 401, then it is clear the statute as applied to the facts in suit is in violation of the due process of law clause of the Fifth Amendment of the Federal Constitution as arbitrary and unreasonable (*Heiner* v. *Donnan*, 285 U. S. 312; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240, and cf. *Hoeper* v. *Tax Commission*, 284 U. S. 206).

As the transfer in suit was not made in contemplation of death, and as the settlor had parted with the property before her death, and had no power of revocation, alteration or appointment to new uses, except with the consent of an adverse interest, and had no dominion over, or control of, the disposition of the property in any substantial sense whatever, and as the trust took effect as of the day of its creation, and the rights of the parties at that time became fixed and determined, there was nothing to pass from

her at her death upon which the tax could fasten. So stated the statute is inapplicable and should be so construed. But if construed nevertheless as applying, the statute, we urge, is unconstitutional for the reasons hereinbefore and hereinafter set out.

POINT II.

The statute if construed to apply to the facts in suit is unconstitutional.

The statute imposes an excise upon the transfer of an estate upon the death of the owner (Sec. 301; *May* v. *Heiner*, 281 U. S. 238, 244; *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61).

As Mr. Justice Sutherland said in *Heiner* v. *Donnan* (285 U. S. 312) at p. 322:

> "The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts *inter vivos*. The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. * * * It is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57.'"

We are here dealing with a death duty, and to justify its imposition there must be a transmission, or the power to transmit or the receipt of property, by virtue of death. Gifts made in contemplation of death are included within the web of the tax scheme "because the transfer is considered to be testamentary in effect" (*Milliken* v. *United States*, 283 U. S. 15, 23), and because the reasons that prompt and motivate such transfers are so assimilated

to death, that in effect it may be said the property passes by virtue of death. But with the exception of such gifts the statute may not bring into the gross estate, within the purview of constitutional limitations, any transfer made *inter vivos* wherein there is nothing of property that passes from the decedent or accrues to the living at or by reason of death.

In estates by the entirety, or joint estates, it has been held (*Tyler* v. *United States*, 281 U. S. 497) that death occasions the shifting of the economic interests and benefits to the survivor, and therefore valuable property rights and assurances pass or accrue by virtue of death. The exercise of powers of appointment by will is the occasion of the transfer of property or the shifting of economic interests at the time of death; transfers, the control of the ultimate disposition of which remain in the power of the settlor until his death, are also appropriately within the power of the Congress, because the death of the decedent terminates the control, ends the possibility of any change by him, and is, in respect of title to the property, the source of valuable assurances passing from the dead to the living (*Porter* v. *Commissioner*, supra, at p. 444).

The Federal estate tax law as a whole comprehends only the passage of property at death or the shifting of economic interests at death or transfers with death as the motivating cause thereof. As Mr. Justice Stone said in *Reinecke* v. *Northern Trust Company*, supra, (at p. 347):

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * It is not a gift tax, * * *. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's

death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

It is of significance, although not conclusive, that the only section imposing the tax, § 401, does so on the net estate of decedents, and that the miscellaneous items of property required by § 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, *are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death.*" (Italics ours.)

The transfer by Gertrude Feldman James was not in contemplation of death, concededly. No property passed from her control, possession or enjoyment at her death. She could not appoint to herself nor revoke for her own benefit because there lay athwart any such power the forbidding hand of a substantial beneficial interest in both the income and the principal of the property transferred. She had no more right or power to appoint to other uses than she had to appoint to herself, and no more power or ability to control the disposition of the property than in any other absolute and irrevocable gift *inter vivos*. The obliteration of the life interest in the income that she had is not the occasion of a death duty under the statute in suit (*May* v. *Heiner*, 281 U. S. 238; *Morsman* v. *Burnet*, 283 U. S. 783; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782).

Her act on February 21, 1930, creating the trust and transferring the property, was, so far as her will and power was concerned, final and unalterable. If this be so then there is no more power in the Congress to bring this transfer within the gross estate so as to subject it to tax as a part of the estate of the decedent than there was under the same act the power to bring the gifts of *Donnan*, equally complete and irrevocable, within the gross estate (*Heiner* v. *Donnan*, supra). There is no relation between the estate of Gertrude Feldman James, if any, and this gift which

was completed prior to her death. To impose a tax on this transfer, or upon her estate and include this transfer as a part thereof, when it was not made in contemplation of death, and the transfer was complete long prior to her death, and when she was without any reserved power of control or disposition of the property either beneficial to herself or otherwise, would in effect be to measure the tax upon the estate of this decedent by the value of property belonging to someone else; or to impose a gift tax upon her upon this gift under the guise of a Federal estate tax imposed and operative a long time after the completion of the transfer. This Court has condemned this basis of taxation (see and cf. *Knowlton* v. *Moore*, 178 U. S. 41, 76; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Hoeper* v. *Tax Commission*, 284 U. S. 206; *Heiner* v. *Donnan*, 285 U. S. 312; and see also the fundamental doctrine laid down in *Reinecke* v. *Northern Trust Company*, supra).

This is not a gift tax, it is a death tax, and to sustain its application and operation the transfer must be assimilated to death or there must be some property of some sort passing out of the control, possession or enjoyment of the decedent at her death, or because of her death. In fact, a death tax imposed upon anything other than property passing at death or transfers made in contemplation of death as substitutes for testamentary dispositions, is capricious and arbitrary and challenges fair dealing even more so than mere retroactive taxes. (*Heiner* v. *Donnan*, supra, p. 328). As Judge Learned Hand said in *Frew* v. *Bowers* (12 F. [2d] 625, at p. 630):

> "Such a law is far more capricious than merely retroactive taxes. They do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

It is respectfully submitted in view thereof that the trust in suit is not subject to tax under the provisions of Section 302(d), for that section does not mean and was not intended by the use of the words "any person" to comprehend one whose interest was directly adverse to the exercise of any control over the disposition of the property. When one makes a gift outright the transfer becomes complete at that moment. Yet the donee may subsequently agree to return the property upon request of the donor. A person who makes a gift to a donee with the provision that the donor may recall the gift with the consent of the donee, stands in no different position. In both cases the gift is complete and irrevocable so far as the power of the donor to withdraw, or modify, or alter the same is concerned.

Gertrude Feldman James having no property interest to transfer at her death, and having no control over the disposition of the property to other uses and purposes at her death, and the transfer not having been made in contemplation of death, the tax, if imposed upon that transfer, is in violation of the due process of law clause of the Fifth Amendment of the Federal Constitution.

POINT III.

No part of the trust fund is subject to the tax.

Even assuming *Lit* v. *Commissioner* (72 F. [2d] 551, C. C. A. 3), was correctly decided—which is by no means free from doubt—that case is not an authority for the taxation of the trust in suit or any part thereof. This is so because the facts in suit are entirely different. In the *Lit* case the consent necessary to revocation or alteration was in the wife, who had a life estate but no interest in the remainder as such. In the case at bar (1) the husband was made the direct remainderman upon the termination of the trust during his life—whether or not the settlor was alive;

and (2) in the discretion of the trustee the husband might receive the whole of the principal for his education, care, comfort, support or advancement in life (R. 5). In addition to this, the *Lit* case is in conflict with *Reinecke* v. *Northern Trust Co.* and *McCormick* v. *Burnet.*

This same argument, here advanced by the petitioner, under facts not wholly unlike those at bar, was made to the same court that decided the *Lit* case in *Commissioner* v. *Stevens* (decided Sept. 17, 1935, C. C. A. 3, unofficially reported in Commerce Clearing House F. T. S. at p. 10,425), and that court refused to apply the *Lit* decision in a case where the beneficiaries whose consent was necessary to alteration or revocation had an interest in the corpus as well as income, though that interest in part was contingent or potential (see also *Helvering* v. *Helmholz,* 75 F. [2d] 245—No. 14 here).

The argument advanced by the petitioner means no more than that the Commissioner of Internal Revenue thinks this Court should have taxed in *Reinecke* v. *Northern Trust Co.* at least two-fifths of the trust for the wife, and in *McCormick* v. *Burnet* should have taxed at least two-thirds of the value of the property transferred, or that those decisions are to be qualified to that extent. But the basis of those decisions is not the quantum of the adverse interest, but the quality that rendered the settlor helpless to modify or alter.

But significant in the argument presented is the implication, half expressed, that the petitioner feels that the decision of *Reinecke* v. *Northern Trust Company* is controlling in this case—certainly to the extent of the beneficial or adverse interest of the husband. In this we submit the petitioner is right. But that interest in the husband runs to the principal as well as to the income.

This point raised by the petitioner, is, we think, without merit.

Conclusion.

Gertrude Feldman James had no interest in the trust fund that passed from her on her death to the living, nor any actual power over its disposition which terminated at her death, and thus no part of the trust created by her on February 21, 1930, is subject to the Federal estate tax. This being so, we submit the plainly correct decision of the Court below should be affirmed.

Respectfully submitted,

RUSSELL L. BRADFORD,
Attorney for Respondent.

CARL TAYLOR,
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Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1935

No. 10

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

CITY BANK FARMERS TRUST COMPANY, as Trustee under agreement with Gertrude Feldman James, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

RUSSELL L. BRADFORD,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES,

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No. 10

GUY T. HELVERING, Commissioner of Internal Revenue,
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TO THE HONOURABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the City Bank Farmers Trust Company, as trustee under an agreement with Gertrude Feldman James, Deceased, the respondent in the above entitled cause, and respectfully presents its petition for a rehearing of the above cause, and, in support thereof, respectfully shows as follows:

The decision of this Court on November 11, 1935, we believe, charts a new course in the jurisprudence of death duty legislation of such vital importance, and the effect of

the decision is so far reaching, that we respectfully urge that a rehearing be granted for the following reasons:

(1) The statute does not in terms require that the power to alter, amend, or revoke, be one *reserved* to the settlor in the trust instrument in order to render, within the purview of this decision, the *inter vivos* transfer subject to the death tax. So far as the statute is concerned, the transfer is apparently within its terms if the power exist, whether by the terms of the instrument, or by virtue of a statute, or by common law. The statute, so far as pertinent, is as follows:

> "To the extent of any interest therein of which the donor has at any time made a transfer, by trust or otherwise, *where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power,* either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *" [Italics ours.]

The decision of this Court will possibly carry with it the right to tax every *inter vivos* gift under the Federal estate tax (as well as the Gift tax) if the gift take the form of a trust, and particularly if all the parties interested therein be adults.

If it be suggested that the statute would not apply to an *inter vivos* gift which may be revoked with the consent of all of the interested parties (where the indenture does not mention such a power) then the statute is not so clear that it is not open to construction. A trust revocable with the consent of all the parties interested by virtue of statute, or state law, is no more complete, so far as the settlor is concerned, than the trust in suit.

If the statute then is open to construction, it should not be construed so as to apply to an absolute transfer, nor to a transfer alterable or revocable only with the consent of an interest in law deemed adverse thereto, for it is equally

absolute to that extent at least. In fact the statute impliedly has been open to construction since its enactment. The very form on which the return is made so indicates. The language of the questionnaire on Form 706 is as follows:

> "Schedule E. (6). Did the decedent, at the time of his death, possess the right (either alone or in conjunction with any person *other than the beneficiary of the transfer*), to change through the exercise of a power to alter, amend, or revoke the transfer of any property previously made by him? (Answer 'Yes' or 'No') ————." [Italics ours.]

If the statute be open to construction, then we suggest we are dealing with a tax upon *transfers* (that is an estate tax), and not one upon the right to receive. We must look to the power or ability of the settlor to alter or revoke. If she have not that power except with the consent of the adverse interested parties (whether given to her in terms, by statute, or by the common law), then there is nothing over which she has the control of the disposition, and no ownership in property that moves from her at death. To the extent of the adverse interest—at least—the beneficiary or adverse interest is the absolute owner. Mere forms or titles do not add to nor detract from the completeness of the transfer or the rights of the adverse interest. Compare *Burnet* v. *Guggenheim* (288 U. S. 280, at p. 283), where this Court said:

> "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid."

See also the footnote on page 283.

(2) If the Committee Reports may not be referred to, and the statute is not subject to any construction, then as above stated the statute applies whether or not the power be

reserved in the trust instrument, if it be in existence as a matter of law at the time of the death of the settlor. However, there is nothing in the Committee Reports concerning Section 302(d) that suggests that that section was inserted into the law solely to prevent evasion or avoidance of the tax.

When the 1918 Act was enacted new items of taxability were added, not solely for the purpose of preventing evasions, but to broaden the tax base—the things made thus taxable being deemed appropriate to death taxes within the purview of *Knowlton* v. *Moore* (178 U. S. 41), such as dower and courtesy; insurance over $40,000; and the exercise of general powers of appointment.

The 1921 Act added no further items of taxability.

At the time the 1924 Act was enacted it was thought, because of the decisions with respect to the New York transfer tax (see *Matter of Carnegie,* 203 App. Div. 91 [1922], aff'd 236 N. Y. 517 [1923]; *Matter of Cochrane,* 117 Misc. 18 [1921], aff'd 202 App. Div. 751 [1922]; *Matter of Miller,* 236 N. Y. 290 [July, 1923]; *Matter of Bowers,* 195 App. Div. 548 [1921], aff'd 231 N. Y. 613 [1921]), and the inheritance taxes of Pennsylvania (*Dolan's Estate,* 279 Pa. St. 582 [March 10, 1924]), and Illinois (*People* v. *Northern Trust Co.,* 289 Ill. 475 [1919]; *People* v. *Kelley,* 218 Ill. 509 [1905]), that trusts subject to a power of revocation, unless the grantor also reserved the income, were not subject to the Federal estate tax (cf. *Matter of Schmidlapp,* 236 N. Y. 278 [1923]); and *a fortiori* so where the power was restrained by the necessity for the consent of another —whether trustee or stranger to the property interests (compare *Matter of Bowers, supra,* and *Hill* v. *Nichols,* 18 F. (2d) 139, Dist. Court, Mass., March, 1927—not appealed).

On July 6, 1923, the Internal Revenue Bureau amended the Regulations issued under the 1921 Act (Reg. 63, Art. 21) so as to leave it a matter of proof as to intention whether or not a transfer subject to a power of revocat[illegible]vas taxable as a transfer intended to take effect in pos[illegible]ssion or

enjoyment at or after death within the purview of Section 402(c) of the 1921 Act.*

It was in the light of this background, we believe, that Section 302(d) was enacted, and added to the taxable items set out in Section 302 of the Revenue Act of 1924, and reenacted in the 1926 Act, for at the time of the enactment of the 1924 Act revocable trusts were not considered *ipso facto* taxable under Section 402(c) of 1921 Act or Section 302(c) of the 1924 Act.

(3) The statute as construed in the decision of this case will subject such gifts not only to the gift tax (see Section 501 of 1932 Act; Reg. 79, Art. 3, and see p. 283, together with footnote in *Burnet* v. *Guggenheim*, supra), but also to the Federal estate tax. In addition to that, if a trust be revoked with the consent of the adverse interest, it is submitted that the Treasury Department will demand a gift tax upon the value of the adverse interest so consenting to revocation to the extent of the value of such adverse interest, on the ground that it constitutes a gift from the beneficiary *to* the original donor. We think this is obvious. The result is that at least under the Gift tax law consent to revocation by an adverse interest may be deemed a gift back.

(4) With deference it is submitted that in this case it was not argued in this Court by counsel that Section 302(d) should be construed in the light of Section 219(g) (Income

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* Prentice Hall Inheritance Tax Service for 1923-1924 at p. 323:

"Art. 21. (As amended by T. D. 3487, dated June 6, 1923). Reservation of powers.—Where a transfer by trust or otherwise is subject to revocation by the donor, or the terms thereof may be altered or amended by him, or he reserves to himself the right to take or assume either full or partial control of the transferred property, or to direct or control the management thereof, all facts and circumstances bearing upon the donor's intent are to be considered, and if it appears that he intended the transfer to take effect in possession or enjoyment at or after his death, then the value of the transferred property should be included in the gross estate, unless it further appears that the transfer was a bona fide sale for a fair consideration in money or money's worth."

Tax provision), as suggested in the opinion. Early in the study of this case it was recognized that Section 219(g) had to do with revesting the corpus in the grantor, while Section 302(d) was wider and had to do also with any change or alteration in the beneficial enjoyment, independently of the right to revest title to the corpus. Because of this recognition counsel studiously avoided making the argument made by other counsel with respect to this point. The argument of the respondent in the case in suit was directed to the point that the settlor being helpless to make the change or alteration, the statute was not applicable, (1), because the words "any person" should not be given a construction that raised grave constitutional questions when another construction was possible; and, (2), because the decisions of this Court seemed to respondent fairly definitely to point to the construction that "any person" excluded a donee or other beneficial interest as the only permissible practical one in view of *Reinecke* v. *Northern Trust Co.* (278 U. S. 339), *Heiner* v. *Donnan* (285 U. S. 312); and also *Witherbee* v. *Helvering*, (70 F. [2d] 696, certiorari denied 293 U. S. 582).

(5) The respondent takes the liberty of calling the attention of the Court to the fact that the opinion states that after the death of the husband-beneficiary, Samuel James, the trust could be revoked, altered or amended with the consent of the trustee and *her* (the settlor's) brother. The provision of the trust (paragraph 12, R. 7) was that consent of Samuel James' brother (Frank Samuel James), not *her* brother, was required. The significance of this lies in the fact that the husband *and his family* (not the settlor's) were the controlling powers in any revocation or alteration of the trust.**

** Attention is also called to the statement in the opinion that Mrs. Gertrude Feldman James was a nonresident citizen of the United States. The record shows only that she was a nonresident (see petition, R. 2; answer, R. 10; stipulation of facts, R. 11)—not that she was a citizen. In fact (outside of the record) the information in the hands of the trustee shows that she was a British subject, the wife of a retired lender of money in London, who also was a British subject.

(6) Trusts of the character here referred to do not now escape taxation. At the same time that Section 302(d) was inserted in the Revenue Act of 1924, the Congress adopted a gift tax law. (It again did so in the Revenue Act of 1932.) We submit that one of the purposes was to impose a gift tax on this class of trusts, and the estate tax law was intended to apply to revocable trusts, or transfers over which the donor had the power of disposition at his death. The present gift tax law specifically imposes a tax upon this class of trusts (see Sec. 501(c) Rev. Act of 1932; cf. *Burnet* v. *Guggenheim*, supra, p. 283; see 1934 Act and Committee Reports set out on p. 15 of our main brief). While, as we contend, this trust may not be subject to the Federal estate tax, by the very same token, and because of this fact, it would be subject to the Federal gift tax if now made. The latter because it is deemed a complete transfer at the time of the creation of the trust, as this Court held in this case. It follows, we submit, if it be taxable as a gift because a complete transfer, that it should not be subject to a Federal estate tax as a transfer at death or as a transfer to be assimilated to death (as in the case of gifts in contemplation of death) because the association with death from which "the power to tax takes its being" (*Knowlton* v. *Moore*, 178 U. S. 41 at p. 56) is too remote. That nothing passes at death which had not already passed upon the effective creation of the trust is recognized in the opinion; as likewise it must be conceded that nothing accrues to the adverse interest that was not already indefeasibly owned by it (cf. *May* v. *Heiner*, 281 U. S. 238).

(7) With deep respect, but with equally deep earnestness, we urge that it is inconceivable to us that the operation of the statute is not as oppressive and harsh as the section declared unconstitutional in *Heiner* v. *Donnan*. Both are transfers "begun and completed wholly by and between the living," not made in contemplation of death. And if completed prior to death (as this Court said), we

believe Congress may not assimilate to the estate as a part thereof something which is not a part, and on the aggregate impose a graduated tax. That the transfers were complete is settled as above stated by decisions of this Court, and that the assets of the trust are not a part of the estate is obvious.

In *Heiner* v. *Donnan*, supra, at p. 322, this Court said:

> "The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. *Milliken* v. *United States*, 283 U. S. 15, 23. But such a transfer, *not so made*, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v. *McCaughn*, 280 U. S. 124), but *obviously not subject to any form of death duty*, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, *which is the subject of a death tax*, [citing cases]; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. (*Cf. Tyler* v. *United States*, 281 U. S. 497, 503). Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other in consequence of death which happens afterward." [Italics ours.]

So far as the power of the donor is concerned, all of these things are true in the case in suit. They are equally true so far as the rights of the adverse beneficial interest are concerned of Samuel James, the husband.

If the transfer is complete then nothing is retained to the settlor—unless it be a power of disposition over the property (as in *Porter* v. *Commissioner*, 288 U. S. 436). But this the settlor here did not have—certainly to the extent of the adverse interest. If the theory upon which the validity of the statute is upheld be the possible avoidance or evasion of the tax (and the Congress so intended) the theory must emerge from the conception that something of substance was reserved to the settlor or remained in her which would be subject to the death duty as a part of her estate. *Non constat* if nothing of substance be in her, nothing of substance in taxes is avoided. If a donor make an absolute gift (not in fact in contemplation of death) nothing remains in the donor that can justify a death tax upon the death of the settlor. From this concept it follows that if the donor has completed his gift, and has no power of disposition or alteration of the beneficial enjoyment in substance—factually—then there remains nothing upon which the death tax can fasten. The postulate that the power to alter or revoke does not exist so far as the adverse interest is concerned does not beg the question,—unless it be decided that all gifts to adults are amenable to the statute because the adult donee may consent to a re-taking of the property or revocation or change in the transfer. Once this is held, the holding in *Heiner* v. *Donnan* would for practical purposes be brushed aside, and all gifts (or at least most) would feel not only the axe of the gift tax, but also the scythe of the death duty.

All gifts avoid or evade the death tax in the sense that so much is not at death a part of the estate or property of the decedent. And the gift tax was enacted to catch such transfers. It has been generally believed, however, that absolute gifts are not amenable to the death tax unless made in contemplation of death. The decision herein, if carried to its logical and natural conclusion, would at the very least mean that an absolute gift in trust would not be taxable if some of the parties in interest were minors or

unable to consent, but that an equally absolute gift in trust would be taxable if all the parties in interest were adults and able to consent, even though the indenture of transfer contained no provision for alteration or revocation (see Section 23, N. Y. Personal Property Law; and Restatement of the Law of Trusts, Sec. 338). In other words, the words "any person" will apply to adults capable of consenting, but not to minors or those unable to consent. The distinction, we believe, is illusory and unreal, and the classification without a basis in substance and actuality.

We respectfully urge the above vital considerations, and respectfully petition for a rehearing.

CITY BANK FARMERS TRUST COMPANY
as Trustee under an agreement with
Gertrude Feldman James, Deceased,
By RUSSELL L. BRADFORD,
Its Attorney.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

RUSSELL L. BRADFORD.

November 29, 1935.

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SUPREME COURT OF THE UNITED STATES.

No. 10.—October Term, 1935.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* City Bank Farmers Trust Company, Trustee. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 11, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

The Revenue Act of 1926, Section 302(d)[1], provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, ..."

The questions for decision are whether the section requires inclusion in the gross estate of the value of the corpus of a trust established in 1930 where the creator reserved a power to revoke or modify, to be exercised jointly with a beneficiary and the trustee; and whether, if such value is to be included in the gross estate, the section offends the Fifth Amendment.

By a writing dated February 21, 1930, Gertrude Feldman James, a non-resident citizen, transferred securities to the respondent as trustee, the trust to last during the lives of her two daughters or the survivor of them. The income was to be paid to her until her death, or until the termination of the trust, whichever should first occur. After her death, her husband surviving, the income was to be paid to him. If he did not outlive her, or upon his death, the income was to be distributed amongst their issue per stirpes. At the termination of the trust the corpus was to be delivered to the husband, if he were alive; if not, to the

[1] C. 27, 44 Stat. 9, 70; U. S. C. App., Tit. 26, Sec. 1094.

settlor, if living, or, if she were dead, to the beneficiaries at that time entitled to receive the income; if there were none such, to the heirs at law of the husband. The trust was irrevocable save that the settlor reserved the right to modify, alter or revoke it, in whole or in part, or to change any beneficial interest, any such revocation or alteration to be effected with the written consent of the trustee and her husband or, if the husband were dead, of the trustee and her brother. If they could not agree the decision of the husband or of the brother, as the case might be, was to be final. Samuel James, the husband, survived the grantor, whose death occurred before the termination of the trust, and he is in receipt of the income.

The petitioner included the value of the corpus of the trust in Mrs. James' gross estate and determined a deficiency of tax. The Board of Tax Appeals reversed, holding that Section 302(d) did not apply.[2] The Circuit Court of Appeals affirmed the Board's decision.[3] We granted the writ of certiorari because the decision below conflicts with that in another circuit.[4] We hold that the section covers this case and as so applied is valid.

The Circuit Court of Appeals thought our decision in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, required the language of the Act to be construed as tantamount to "in conjunction with any person not a beneficiary". So limited it is inapplicable to the trust in question.[5]

The *Reinecke* case involved Section 402 (c) of the Revenue Act of 1921[6] (substantially Section 302 (c) of the Revenue Act of 1926) which directed the inclusion in the gross estate of all property "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . . ." It was held that a gift beyond the power of the grantor to alter, amend or revoke could not be said to take effect in possession

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[2] 29 B. T. A. 1141.

[3] 74 F. (2d) 242.

[4] *Commissioner* v. *Strauss*, 77 F. (2d) 401.

[5] Compare *White* v. *Poor*, 75 F. (2d) 35 (No. 36 of this term), and *Helvering* v. *Helmhols*, 75 F. (2d) 245 (No. 14 of this term); *Lit* v. *Commissioner*, 72 F. (2d) 551; *Commissioner* v. *Stevens*, (C. C. A. 3, Sept. 17, 1935), Commerce Clearing House Federal Tax Service, p. 10425.

[6] C. 136, 42 Stat. 227.

or enjoyment at or after his death. Conversely, one which he alone held the power to revoke or modify came within the section, since, at his death, substantial interests passed from his control and were for the first time confirmed in others. The case involved nothing more than a determination whether the transfers were complete when made. If they were the statute did not reach them. Here we have a different problem, for Section 302 (d) of the 1926 Act on its face embraces Mrs. James' transfer, although complete when made and thereafter beyond her own unfettered control.

The respondent says that the section ought to be construed in the light of the analogous Section 219 (g).[7] The latter, part of the income tax title, is "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." The two sections have a cognate purpose but they exhibit marked differences of substance. The one speaks of a power to be exercised with one not a beneficiary; the other of a power to be exercised with any person. The one refers to a power to revest the corpus in the donor; the other has no such limitation.[8] It is true, the Report of the Ways and Means Committee on Section 302 (d) said "this provision is in accord with the principle of Section 219 (g) of the bill which taxes to the grantor the income of a revocable trust."[9] But to credit the assertion that the difference in phraseology is without significance and in both sections Congress meant to express the same thought, would be to disregard the clear intent of the phrase "any person" employed in Section 302 (d). We are not at liberty to construe language so plain as to need no construction,[10] or to refer to Committee reports where there can be no doubt of the meaning of the words used.[11] The section applies to this transfer.

We are next told that if the Act means what it says it taxes a transfer as one taking effect at death though made prior to death

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[7]C. 27, 44 Sat. 9, 34; U. S. C. App., Tit. 26, Sec. 960.
[8]Compare *Porter* v. *Commissioner*, 288 U. S. 436.
[9]H. R. No. 179, 69th Cong., 1st Sess., p. 28.
[10]*Hamilton* v. *Rathbone*, 175 U. S. 414, 419; *Thompson* v. *United States*, 246 U. S. 547, 551.
[11]*Wilbur* v. *United States*, 284 U. S. 231, 237.

and complete when made; that to do this is arbitrary and deprives the taxpayer of property without due process.

The section was first introduced into the Revenue Act of 1924, and re-enacted in that of 1926. Mrs. James created her trust in 1930. She was, therefore, upon notice of the law's command, and there can be no claim that the statute is retroactive in its application to her transfer.

The inquiry is whether it is arbitrary and unreasonable to prescribe for the future that, as respects the estate tax, a transfer, complete when made, shall be deemed complete only at the transferor's death, if he reserves power to revoke or alter exerciseable jointly with another.

The respondent insists that a power to recall an absolute and complete gift only with the consent of the donee is in truth no power at all; that in such case the so-called exercise of the power is equivalent to a new gift from the donee to the donor. And so it is claimed that the statute arbitrarily declares that to exist which in fact and law is nonexistent. The position is untenable. The purpose of Congress in adding clause (d) to the section as it stood in an earlier act was to prevent avoidance of the tax by the device of joining with the grantor in the exercise of the power of revocation someone ~~whom~~ who he believed would comply with his wishes. Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate. Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed.

Illustrations are not lacking of cases falling on either side of the line.

Congress may require that property transferred in contemplation of death, although the transfer is so remote in time as not to comply with the requirements of a gift *causa mortis*, shall nevertheless be treated as part of the estate for purposes of taxation: this for the prevention of evasion and the giving of practical effect to the exercise of admitted power.[13] This is true despite the fact that the statutory prescription embraces gifts *inter vivos* which are in fact fully executed, irrevocable and cannot be defeated.[15]

Although property received by gift from another is capital in the hands of the donee the gain upon a sale may be measured by the cost to the donor rather than the value at the time of acquisition by the donee.[14]

It is competent for Congress, in order to avoid the evasion of tax, to declare that when one has placed his property in trust subject to a right of revocation in himself and another who is not the beneficiary he shall, nevertheless, be deemed to control the property in such sense that the income therefrom shall be treated as his income for the levying of a tax.[15] So also where an irrevocable trust is established to pay for insurance on the settlor's life, to collect the policy upon his death, and to hold or apply the proceeds for the benefit of his dependents, Congress may declare the income of the trust fund taxable to the settlor as part of his own income.[16]

In the instances cited the power to levy an excise upon the testamentary transfers or to tax income was conceded. To effectuate the exercise of this admitted power and to prevent evasion Congress was held to have acted reasonably in including within the sweep of the statute a status or an act not normally within its reach.

There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due

[13] *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken* v. *United States*, 283 U. S. 15, 20; *United States* v. *Wells*, 283 U. S. 102, 116.
[14] *United States* v. *Wells* (*supra*).
[15] *Taft* v. *Bowers*, 278 U. S. 470, 483.
[16] *Reinecke* v. *Smith*, 289 U. S. 172, 177.
[16] *Burnet* v. *Wells*, 289 U. S. 670.

process clause of the Fifth Amendment.[17] In the same category falls a statute seeking to tax the separate income of a wife as income of her husband.[18]

In view of the evident purpose of Congress we find nothing unreasonable or arbitrary in the provisions of Section 302 (d) of the Revenue Act of 1926 as applied in the circumstances of this case. It was appropriate for Congress to prescribe that if, subsequent to the passage of that Act, the creator of a trust estate saw fit to reserve to himself jointly with any other person the power of revocation or alteration, the transaction should be deemed to be testamentary in character, that is, treated for the purposes of the law as intended to take effect in possession or enjoyment at the death of the settlor.

The judgment is reversed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, Mr. Justice SUTHERLAND and Mr. Justice BUTLER are of opinion that the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[17] *Heiner* v. *Donnan*, 285 U. S. 312. Compare *Schlesinger* v. *Wisconsin*, 270 U. S. 230.

[18] *Hooper* v. *Tax Commission*, 284 U. S. 206.